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SELECT CASES

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LAW OF PROPERTY.

BY

JOHN CHIPMAN GRAY,

ROYALL PROFESSOR OF LAW IN HARVARD UNIVERSITY.

VOLUME IV.

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SELECT CASES

AND OTHER

AUTHORITIES ON THE LAW OF PROPERTY.

BOOK VII.

ACQUISITION OF PROPERTY ON DEATH OF FORMER OWNER.

CHAPTER I.

ESCHEAT.

Lit. § 348. Also, if lord and tenant be, and the tenant make a lease for term of life, rendering to the lessor and his heirs such an annual rent, and for default of payment a re-entry, &c., if after the lessor dieth without heir during the life of the tenant for life, whereby the reversion cometh to the lord by way of escheat, and after the rent of the tenant for life is behind, the lord may distrain the tenant for the rent behind; but he may not enter into the land by force of the condition, &c., because that he is not heir to the lessor, &c.

Co. Lit. 13 a. *Escheat*, *eschaeta*, is a word of art, and derived from the French word *escheat* (*id est*) *cadere*, *excidere* or *accidere*, and signifieth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee is escheated. And therefore, of some, *escheats* are called *excadentiæ* or *terræ excadentiales*. "Dominus vero capitalis loco hæredis habetur, quoties per defectum vel delictum extinguitur sanguis sui tenentis. Loco hæredis et haberi poterit cui per modum donationis fit reversio cujusque tenementi." And Ockam (who wrote in the reign of Henry the Second) treating of tenures of the king, saith, "porro eschaetæ vulgo dicuntur, quæ decedentibus hiis qui de rege tenent, &c., cum non existit ratione sanguinis hæres, ad fiscum relabuntur." So as an escheat doth happen two manner of ways, "aut per defectum sanguinis," *i. e.* for default of heir, "aut per delictum tenentis," *i. e.* for felony, and that is by judgment three manner of ways, "aut quia suspensus per collum, aut quia abjuravit regnum, aut quia utlegatus est." And therefore they

which are hanged by martial law "in furore belli" forfeit no lands; and so in like cases escheats by the civilians are called "caduca."

The father is seised of lands in fee holden of I. S., the son is attainted of high treason, the father dieth, the land shall escheat to I. S., *propter defectum sanguinis*, for that the father died without heir. And the king cannot have the land, because the son never had anything to forfeit. But the king shall have the escheat of all the lands whereof the person attainted of high treason was seised, of whomsoever they were holden.

Co. Lit. 13 b. And it is to be well observed that our author saith, *if he hath no heir, &c., the land shall escheat.* In which words is implied a diversity (as to the escheat) between fee simple absolute, which a natural body hath, and fee simple absolute, which a body politic or incorporate hath. For if land holden of I. S. be given to an abbot and his successors, in this case if the abbot and all the convent die, so that the body politic is dissolved, the donor shall have again this land, and not the lord by escheat.[1] And so if land be given in fee simple to a dean and chapter, or to a mayor and commonalty, and to their successors, and after such body politic or incorporate is dissolved, the donor shall have again the land, and not the lord by escheat. And the reason and the cause of this diversity is, for that in the case of a body politic or incorporate the fee simple is vested in their politic or incorporate capacity created by the policy of man, and therefore the law doth annex the condition in law to every such gift and grant, that if such body politic or incorporate be dissolved, that the donor or grantor shall re-enter, for that the cause of the gift or grant faileth; but no such condition is annexed to the estate in fee simple vested in any man in his natural capacity, but in case where the donor or feoffor reserveth to him a tenure, and then the law doth imply a condition in law by way of escheat. Also (as hath been said) no writ of escheat lieth but in the three cases aforesaid, and not where a body politic or incorporate is dissolved.

3 Inst. 21. If a man seised in fee of a fair, market, common, rent-charge, rent-seck, warren, corody, or any other inheritance, that is not holden, and is attainted of felony, the king shall have the profits of them during his life: but after his decease, seeing the blood is corrupted, they cannot descend to the heir, nor can they escheat because they be not holden, they perish and are extinct by act in law: for in escheats for petit treason or felony, a tenure is requisite, as well in the case of the king, as of the subject.

[1] *Vid. tamen Mich. 20 Jac. C. B. Johnson and Morris, that it shall escheat.* Hal. MSS. which also cites 21 E. 4, 1, and 21 H. 7, 9. See further on this subject, Godb. 211, and Mo. 283, which are with Lord Coke. But the case of *Johnson and Norway*, in Win. 37, which seems to be the same as that cited by Lord Hale, is against the donor, though it is not mentioned in Winch that the judges *finally* decided the point. See also *contra* Lord Coke, the case of *Southwell and Wade*, in 1 Ro. Abr. 816 A, pl. 1, and s. c. in Poph. 91. — Hargrave's note *ad loc.* See Gray, Rule against Perpetuities, §§ 44–51.

JOHNSON *v.* NORWAY.

COMMON PLEAS. 1622.

[*Reported Winch*, 37.]

JOHNSON brought an action of trespass against Norway of trespass made in a piece of ground, and the defendant pleaded that 14 H. 7, Roger Le Strange and Anne his wife were seised of the manor of D., and one Giles Sherington, abbot of C., was seised of an acre of land in fee, and held this of the said Roger Le Strange as of the manor of D. aforesaid, and that the 22 H. 7, the abbot and all the monks died, by which the said land escheated to Roger, &c., and the manor descended to his son and heir after his death; who conveyed the manor of which the acre is parcel after the escheat by mean conveyance to Hobert in fee, and that Hobert 12 Eliz. enfeoffed one Wright of the manor, of which the said acre is parcel, and so justified by a conveyance from Wright to the defendant: the plaintiff replied by protestation that the abbot was not eligible, and for plea he said, that the aforesaid Hobert 10 Eliz. enfeoffed I. S. of the said acre of land, *absque hoc*, that he enfeoffed Wright of the said manor of which the said acre is parcel; and upon this the defendant demurred generally. And *Serjeant Attoe* argued for the plaintiff, that the plea of the defendant is evil, and then though the replication of the plaintiff is not good, yet the plaintiff shall have judgment, and he cited *Turner's Case*. HOBERT, It is true, if the replication be merely void, then it is as you had said, but if the replication be the title of the plaintiff, and that be insufficient, there the plaintiff shall not have judgment, though the plea in bar was evil. *Attoe* agreed, that if it appear by the plaintiff's own showing that he had no cause of action, and that he had no title, he shall not have judgment, but here he had made a good title by the lease of the said acre of land, and though our traverse is evil, and sounds in doubleness, yet the defendant had demurred generally, and so he had lost the advantage of the doubleness, or of the negative pregnant, for if a man plead double matter, this is only matter of form, and not of substance, and therefore after verdict it is good as hath been adjudged: but he proceeded in his argument, and he said that the bar of the defendant is not good, for by his own showing this acre of land is not parcel of the manor, for by the dissolution of the monastery by the death of all the monks, the land shall go to the founders and donors, and not to escheat to the lord of which that is holden, as appears 2 H. 6, 7, and 5 H. 7, if an annuity or rent be granted to an abbot in fee, and the abbot and all his monks do die, the annuity or the rent is extinct, and shall not escheat: see the *Dean of Norwich's Case*, Co. 3, agreed, that by the death of the abbot and his convent the corporation is dissolved, and then the possession shall go to the founders, and shall not escheat to

the lord of the manor of which the land was holden, and he said that this point is proved clearly by the Statute, of the 27 H. 8, and 31 H. 8, of Monasteries, in which Statutes there is an express saving to all persons, except to the donors and to their heirs; and no mention is made of the saving of the right of those of whom the land was holden; and that proves clearly that if the makers of the Statute had thought that the land had escheated to the lords, they would have excepted them in the saving of the Act, as they had excepted the donors and founders, for if otherwise the lands and possessions shall escheat to the lords of which the land was holden, they are within the saving of the Statute; and then it will follow that after the death of all the monks, as at this day, that the lords shall have the land by escheat, which the sages of the law never dreamt of who made that Statute, that anything may accrue to the lord, and therefore they provided only for the title of the donors and founders, which is an argument that they thought that upon the dissolution of the monasteries that the lands shall go to the founders, and the same be thought concerning a corporation at this day, as of Sutton's Hospital, &c., and so be concluded that, because in the bar of the defendant he claimed to hold from the lord, to whom he supposed the land to escheat, and did not claim, &c., by his own showing the bar is not good: and though our replication and traverse is not good, yet the plaintiff shall have judgment.

But admitting that the bar is good, yet the replication and traverse is good, and then judgment shall be given to the plaintiff: and the case is, the defendant pleaded a feoffment of the manor 12 Eliz. to Wright after that he had showed the escheat of an acre, the plaintiff replied that the 10th Eliz. the feoffor enfeoffed C. of the acre of land, *absque hoc* that he was enfeoffed of the manor of which the acre is parcel, and *Attoe* argued that the traverse is good, and he alleged 38 H. 6, 49, the same traverse, and here when the defendant had pleaded that the acre escheated, and had alleged a feoffment of the manor, and had not expressly alleged a feoffment of the acre, the plaintiff may traverse that which is not expressly alleged, because this destroys the very title of the defendant; and he cited for that 34 H. 6, 15, a writ of privilege in trespass, as a servant to an auditor of the exchequer, the plaintiff replied that he was servant to him in husbandry, *absque hoc* that he was his servant to wait and attend upon him in his office, and it was holden a good traverse, and yet that was not expressly alleged by the defendant.

Hobert, Chief Justice, said, that the traverse is not good, for by the feoffment which was made the 12th Eliz. he had confessed and avoided the feoffment which was made 10th Eliz., and so there needed no traverse, and therefore, he said, the great doubt of the case will be upon the bar of the defendant, whether by the death of the abbot and the monks the land escheat to the lords of whom that was holden, or whether that shall go to the donors and to the founders, and he thought that the land shall escheat, to which Winch seemed to agree; and

Hobert said, that the writ of *contra formam donationis* was given to the founder or donor by the Statute, and not by the common law; but in the principal case, the judges said they would advise of that, and gave day over to argue that again.[1]

[1] See preceding note.

Note. — "Escheat therefore being a title frequently vested in the lord by inheritance, as being the first of a seigniory to which he was entitled by descent (for which reason the lands escheated shall attend the seigniory, and be inheritable by such only of his heirs as are capable of inheriting the other), it may seem in such cases to fall more properly under the former general head of acquiring title to estates, viz., by descent (being vested in him by act of law, and not by his own act or agreement), than under the present, by purchase. But it must be remembered that, in order to complete this title by escheat, it is necessary that the lord perform an act of his own, by *entering* on the lands and tenements so escheated, or suing out a *writ of escheat:* on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a stranger who usurps the possession, his title by escheat is barred. It is therefore in some respect a title acquired by his own act, as well as by act of law. Indeed, this may also be said of descents themselves, in which an entry or other seisin is required, in order to make a complete title: and therefore this distribution of titles by our legal writers, into those by descent and by purchase, seems in this respect rather inaccurate, and not marked with sufficient precision: for, as escheats must follow the nature of the seigniory to which they belong, they may vest by either purchase or descent, according as the seigniory is vested. And, though Sir Edward Coke considers the lord by escheat as in some respects the assignee of the last tenant, and therefore taking by purchase; yet, on the other hand, the lord is more frequently considered as being *ultimus hæres*, and therefore taking by descent in a kind of caducary succession." — 2 Bl. Com. 244. See Co. Lit. 18 b, Hargrave's note.

"Great care must be taken to distinguish between forfeiture of lands to the king and this species of escheat to the lord; which by reason of their similitude in some circumstances, and because the Crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon law, as a part of punishment for the offence; and does not at all relate to the feudal system, nor is the consequence of any seigniory or lordship paramount: but, being a prerogative vested in the Crown, was neither superseded nor diminished by the introduction of the Norman tenures; a fruit and consequence of which, escheat must undoubtedly be reckoned. Escheat therefore operates in subordination to this more ancient and superior law of forfeiture.

"The doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant, by the commission of any felony (under which denomination all treasons were formerly comprised), is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit*. Upon the thorough demonstration of which guilt, by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out forever. In this situation the law of feudal escheat was brought into England at the Conquest; and in general superadded to the ancient law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revest in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage: in case of treason, forever; in case of other felony, for only a year and a day; after which time it goes to the lord in a regular course of escheat, as it would have done to

the heir of the felon in case the feudal tenures had never been introduced. And that this is the true operation and genuine history of escheats will most evidently appear from this incident to gavelkind lands (which seems to be the old Saxon tenure), that they are in no case subject to escheat for felony, though they are liable to forfeiture for treason." — *Id.* 251.

On attainder and civil death, see *Kynnaird* v. *Leslie*, L. R. 1 C. P. 389. Cf. *Avery* v. *Everett*, 110 N. Y. 317.

On the rights of the Crown to equitable interest in real and personal property when *cestui que trust* dies without heirs or next of kin, see cases collected in Ames, Cases on Trusts, 497–515 ; and cf. Mr. Hardman's article in 4 Law Quart. Rev. 318.

CHAPTER II.

DESCENT.

SECTION I.

IN GENERAL.

St. 20 Hen. III. (Merton) c. 9. — To the King's Writ of Bastardy, whether one being born before matrimony may inherit in like manner as he that is born after matrimony, all the bishops answered, that they would not, nor could not, answer to it; because it was directly against the common order of the Church. (2) And all the bishops instanted the Lords, that they would consent, that all such as were born afore matrimony should be legitimate, as well as they that be born within matrimony, as to the succession of inheritance, forsomuch as the Church accepteth such for legitimate. And all the Earls and Barons with one voice answered, that they would not change the laws of the realm, which hitherto have been used and approved.

Lit. § 2. And if a man purchase land in fee simple and die without issue, he which is his next cousin collateral of the whole blood, how far soever he be from him in degree, may inherit and have the land as heir to him.

Lit. § 3. But if there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee simple, and die without issue, living his father, the uncle shall have the land as heir to the son, and not the father, yet the father is nearer of blood; because it is a maxim in law, that inheritance may lineally descend, but not ascend. Yet if the son in this case die without issue, and his uncle enter into the land as heir to the son (as by law he ought) and after the uncle dieth without issue, living the father, the father shall have the land as heir to the uncle, and not as heir to his son, for that he cometh to the land by collateral descent and not by lineal ascent.

Lit. § 4. And in case where the son purchaseth land in fee simple, and dies without issue, they of his blood on the father's side shall inherit as heirs to him, before any of the blood on the mother's side: but if he hath no heir on the part of his father, then the land shall descend to the heirs on the part of the mother. But if a man marrieth an inheritrix of lands in fee simple, who have issue a son, and die and the son enter into the tenements, as son and heir to his mother, and after dies without issue, the heirs of the part of the mother ought to inherit, and not the heirs of the part of the father. And if he hath no heir on

the part of the mother, then the lord, of whom the land is holden, shall have the land by escheat. In the same manner it is, if lands descend to the son of the part of the father, and he entereth, and afterwards dies without issue, this land shall descend to the heirs on the part of the father, and not to the heir on the part of the mother. And if there be no heir of the part of the father, the lord of whom the land is holden shall have the land by escheat. And so see the diversity, where the son purchaseth lands or tenements in fee simple, and where he cometh to them by descent on the part of his mother, or on the part of his father.

Lit. § 5. Also, if there be three brethren, and the middle brother purchaseth lands in fee simple, and die without issue, the elder brother shall have the land by descent, and not the younger, &c. And also if there be three brethren, and the youngest purchase lands in fee simple, and die without issue, the eldest brother shall have the land by descent, and not the middle, for that the eldest is most worthy of blood.

Lit. § 6. Also, it is to be understood, that none shall have land of fee simple by descent as heir to any man, unless he be his heir of the whole blood. For if a man hath issue two sons by divers venters, and the elder purchase lands in fee simple, and die without issue, the younger brother shall not have the land, but the uncle of the elder brother, or some other his next cousin, shall have the same, because the younger brother is but of half blood to the elder.

Lit. § 7. And if a man hath issue a son and a daughter by one venter, and a son by another venter, and the son of the first venter purchase lands in fee and die without issue, the sister shall have the land by descent, as heir to her brother, and not the younger brother, for that the sister is of the whole blood of her elder brother.

Lit. § 8. And also, where a man is seised of lands in fee simple, and hath issue a son and daughter by one venter, and a son by another venter, and die, and the eldest son enter, and die without issue, the daughter shall have the land, and not the younger son, yet the younger son is heir to the father, but not to his brother. But if the elder son doth not enter into the land after the death of his father, but die before any entry made by him, then the younger brother may enter, and shall have the land as heir to his father. But where the elder son in the case aforesaid enters after the death of his father, and hath possession, there the sister shall have the land, because *possessio fratris de feodo simplici facit sororem esse hæredem.* But if there be two brothers by divers venters, and the elder is seised of land in fee, and die without issue [and his uncle enter as next heir to him, who also dies without issue], now the younger brother may have the land as heir to the uncle, for that he is of the whole blood to him, albeit he be but of the half blood to his elder brother.

Co. Lit. 13 a. If a man giveth lands to a man, to have and to hold to him and his heirs on the part of his mother, yet the heirs of the part of the father shall inherit, for no man can institute a new kind of inheritance not allowed by the law, and the words (of the part of his

mother) are void, as in the case that Littleton putteth in this chapter. If a man giveth lands to a man to him and his heirs males, the law rejecteth this word males, because there is no such kind of inheritance, whereof you shall read more in his proper place.

Co. Lit. 26 b. John de Mandeville by his wife Roberge had issue Robert and Mawde. Michael de Morevill gave certain lands to Roberge and the heirs of John Mandeville her late husband on her body begotten, and it was adjudged that Roberge had an estate but for life, and the fee tail vested in Robert (heirs of the body of his father being a good name of purchase), and that when he died without issue, Mawde the daughter was tenant in tail as heir of the body of her father, *per formam doni*, and the formedon which she brought supposed, "quod post mortem præfatæ Robergiæ et Roberti filii et hæredis ipsius Johannis Mandeville et hæred' ipsius Johannis de præfata Robergia per præfatum Johannem procreat' præfat' Matildæ filiæ prædict' Johannis de præfata Robergia per præfatum Johannem procreatæ sorori et hæredi prædicti Roberti descendere debet per formam donationis prædict'." And yet in truth the land did not descend unto her from Robert, but because she could have no other writ it was adjudged to be good. In which case it is to be observed, that albeit Robert being heir took an estate tail by purchase, and the daughter was no heir of his body at the time of the gift, yet she recovered the land *per formam doni*, by the name of heir of the body of her father, which notwithstanding her brother was, and he was capable at the time of the gift; and therefore when the gift was made she took nothing but in expectancy, when she became heir *per formam doni*.

CANONS OF DESCENT.[1]

1. Inheritances shall lineally descend to the issue of the person who last died actually seised *in infinitum*, but shall never lineally ascend.[2]

2. The male issue shall be admitted before the female.

3. Where there are two or more males in equal degree, the eldest only shall inherit, but the females all together.

4. The lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor: that is, shall stand in the same place as the person himself would have done had he been living.

5. On failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.[3]

[1] These canons are taken from Blackstone. On the Law of Descent, see 2 Bl. Com. c. 14, pp. 200–240.

[2] See *Jackson* d. *Austin* v. *Howe*, 14 Johns. 405.

[3] "The method of computing these degrees in the canon law, which our law has adopted, is as follows: we begin at the common ancestor and reckon downwards: and

6. The collateral heir of the person last seised must be his next collateral kinsman of the whole-blood.[1]

7. In collateral inheritances, the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near); unless where the lands have, in fact, descended from a female.[2]

DOE d. GREGORY *v.* WHICHELO.

King's Bench. 1799.

[*Reported* 8 *T. R.* 211.]

This ejectment was brought on the demise of J. Gregory as to one undivided third part of certain premises in Sussex, and on the demise of D. Geere as to another undivided third part. At the trial at the last assizes for Sussex a verdict was found for the plaintiff, subject to the opinion of this court on the following case.

Elizabeth Lemmon, widow, being seised in fee of certain lands in the parishes of Jevington and Folkington in Sussex, by will dated 12th January 1693 devised the same "to her son Richard Lemmon and her daughter Elizabeth wife of E. Baldy and their heirs forever, provided that if her said son and daughter should both have issue, then both their dividends aforesaid were to go to the issue of their own bodies; but if but one of them should have issue, then the premises should go to that issue, whether it be the child of her son or daughter

in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus, Titius and his brother are related in the first degree; for from the father to each of them is counted only one; Titius and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor; viz., his own grandfather, the father of Titius." — 2 Bl. Com. 206.

[1] "In agnation too is to be sought the explanation of that extraordinary rule of English law, only recently repealed, which prohibited brothers of the half-blood from succeeding to one another's lands. In the customs of Normandy, the rule applies to *uterine* brothers only, that is, to brothers by the same mother but not by the same father; and, limited in this way, it is a strict deduction from the system of agnation, under which uterine brothers are no relations at all to one another. When it was transplanted to England, the English judges, who had no clew to its principle, interpreted it as a general prohibition against the succession of the half-blood, and extended it to *consanguineous* brothers, that is to sons of the same father by different wives. In all the literature which enshrines the pretended philosophy of law, there is nothing more curious than the pages of elaborate sophistry in which Blackstone attempts to explain and justify the exclusion of the half-blood." — Maine, Anc. Law (4th ed.), 151.

[2] See *Clere* v. *Brook*, Plowd. 442, 450, 451; 2 Bl. Com. 238, 240; *Davies* v. *Lowndes*, 7 Scott, 21, 56.

aforesaid: but if they both died without issue of their own bodies, then immediately to the right heir at law and his heirs forever." On the devisor's death her son and daughter entered and became seised of the estate by virtue of the will. Afterwards by indentures of lease and release (executed after the death of Edward the husband of Elizabeth Baldy) dated the 21st and 22d of November 1748, Richard Lemmon granted all his undivided moiety to Elizabeth Baldy in fee, and thereby covenanted to levy a fine *sur cognizance de droit come ceo*, &c., unto the said Elizabeth Baldy and her heirs of the said moiety, which fine was thereby declared to inure to the use of the said Elizabeth in fee. Elizabeth Baldy had two sons who died in her lifetime without issue, and also one daughter Elizabeth who intermarried with Thomas Allen and died in the lifetime of Elizabeth Baldy, leaving an only daughter Elizabeth Allen. Elizabeth Baldy by will dated 6th October 1744 devised to her granddaughter Elizabeth Allen in fee "all that her part and parcel of freehold lands lying in Jevington and Folkington," &c. Elizabeth Baldy after purchasing a moiety of the estate from her brother Richard Lemmon did not make any alteration in her will, but died intestate as to that moiety without having barred the entail of her original moiety, and before any fine was levied by her said brother pursuant to the deeds of lease and release. And upon the death of Elizabeth Baldy on the 15th of December 1748, Elizabeth Allen her granddaughter entered into possession of the whole estate. A fine was afterwards levied in Trinity Term 1749 of the moiety, wherein Elizabeth Allen was plaintiff and the said Richard Lemmon the elder deforciant, but no deed to lead the uses of such fine was then or at any time afterwards executed. On the 27th of July 1749 Elizabeth Allen intermarried with Benjamin Brooker, and died in April 1790 without issue and intestate. Richard Lemmon the elder had issue by his first wife one son named Richard Lemmon, and a daughter, Martha, and by his second wife had issue three daughters, Ann, Elizabeth, and Grace; all of whom survived their father. Richard Lemmon the son afterwards died without issue and intestate, leaving his sister Martha of the whole blood and his three sisters of the half blood and the said Elizabeth Brooker him surviving. His sister Martha intermarried with John Whichelo, and afterwards died leaving John Whichelo, the present defendant, her eldest son and heir at law, who on the death of Elizabeth Brooker entered into possession of the premises which he now retains. Ann the eldest daughter of Richard Lemmon the elder by his second marriage is dead, leaving James Gregory one of the lessors of the plaintiff her grandson and heir at law. Elizabeth, the second daughter of Richard Lemmon the elder by the second ventre, died in June 1789 without issue; and Grace the third daughter is also dead leaving Diones Geere the other lessor of the plaintiff her only son and heir at law.

The question reserved for the opinion of the court was whether the plaintiff is entitled to recover the said two third parts or either of them:

if so, the verdict to stand; if one only, the verdict to be entered accordingly; if neither, a verdict to be entered for the defendant.

Conste for the lessors of the plaintiff. By the will of Elizabeth Lemmon, from whom all the parties claim, Richard Lemmon her son and Elizabeth Baldy her daughter took estates tail in moieties, as tenants in common, with cross remainders to their issue. Afterwards by the sale of Richard Lemmon's part to Elizabeth Baldy the whole vested in her and *descended* to Elizabeth Brooker then Elizabeth Allen. And upon her death without issue in 1790 the question is, who are the issue inheriting under the entail created by Elizabeth Lemmon's will? Now the lessors of the plaintiff, one of whom is the grandson and the other the great-grandson of R. Lemmon the elder through his daughters by his second marriage, are entitled each to one third, and the defendant who claims through the eldest daughter of Richard Lemmon the elder to the remaining third. It is unnecessary to consider the operation of the fine in this case, whether or not it converted a moiety of the estate-tail into a fee, for in either way of considering the question the lessors will be entitled to the same proportion. For it is stated in the case that Richard Lemmon the son (through whose sister Martha, of the whole blood, the defendant claims the whole) died in the lifetime of Mrs. Brooker, and consequently was never in possession of the estate. But all the three sisters of Richard Lemmon the younger are equally of the whole blood of Richard Lemmon the father, from whom alone they must all claim, they being his heirs special *per formam doni*. It is clearly settled that the rule of *possessio fratris* does not apply to entails, Co. Lit. 15 b. For the heirs in the entail are not to make title as heirs of the whole blood of the person last seised, as in the case of lands held in fee-simple, but as heirs to the original donee. Plowd. 57; *Ratcliffe's Case*, 3 Co. 42; *Goodtitle* v. *Newman*, 3 Wils. 526. So on the other hand Martha the sister of the whole blood of Richard the younger cannot claim lands in fee from him who was never seised, but can only claim from her father or grandmother, in which case the claims of Ann and Grace her half sisters stand upon an equal footing with her own. In either case therefore the lessors are entitled to recover two thirds.

Holroyd, contra, admitted that he could not claim more than one third for the defendant.

Lord Kenyon, C. J. In the case of estates tail the half blood coming within the description of the entail may inherit as effectually as the whole blood. There the rule of *possessio fratris* does not apply. Neither does it in the case of peerages. Nor does that rule hold even with respect to inheritances in fee-simple unless there be an actual possession of the brother, or that which has been deemed equivalent. For in that respect there is a difference between freehold and chattel leases outstanding. In the former case unless the elder brother afterwards obtain possession by the receipt of rent or other acknowledgment, the descent will be to the younger brother of the half blood in

preference to the sister of the whole blood: but in the case of a chattel lease outstanding, the possession of the tenant is the possession of the landlord; and there the rule of *possessio fratris* attaches. In this case it clearly appears that the children of Elizabeth Lemmon took estates tail under her will. But it also appears to me, if it were necessary to enter into that question, that the conveyance by Richard Lemmon one of the tenants in tail of his moiety to his sister having created a base fee, that estate so created was afterwards confirmed by the fine, which though not levied until after the death of the releasee was governed by the previous deed to lead the uses of it.

PER CURIAM. Verdict to be entered for the plaintiff for two thirds.

BUSHBY *v.* DIXON.

KING'S BENCH. 1824.

[*Reported* 3 *B. & C.* 298.]

DEBT on a bond, dated the 12th of November 1795, executed by John Milbourn Dixon, deceased, and Lucy Dixon, deceased, to John Bushby, deceased, in the penal sum of £360, conditioned for the payment of £180, with interest, at 4¾ per cent. on the 12th of November 1796. The first plea was *Non est factum*. The second *Solvit ad diem*. The third *Solvit post diem*. On which pleas respectively issues were joined, and found for the plaintiff. The last plea and issue thereon were as follows: that defendant ought not to be charged with the said debt, by virtue of the said supposed writing obligatory, because he, the said defendant, hath not, nor at the time of the exhibiting the bill of the said plaintiffs in this behalf, nor at any time before or since, had he any lands, tenements, or hereditaments by descent from the said John Milbourn Dixon, in fee simple; and this, &c., wherefore he prays judgment if he, the said defendant, as heir of the said John Milbourn Dixon deceased, ought to be charged with the said debt by virtue of the said writing obligatory. Replication, that the defendant hath, and at the time of the exhibiting of the bill of the plaintiffs in this behalf, had sufficient lands, tenements, and hereditaments by descent from the said John Milbourn Dixon in fee simple, wherewith the said defendant could, and might, and ought to have satisfied the said debt above demanded. At the trial before *Holroyd*, J., at the Summer Assizes for Cumberland, 1823, a verdict was found for the plaintiffs on this last issue, subject to the opinion of the court on the following case. The obligor, Lucy Dixon, at the time of making her will, and also of her death as hereinafter mentioned, was seised in fee of the adjoining tenements of Catlowdy and Simeons Onset, being both of freehold tenure, and situate in the parish of Kirk Andrews upon Esk, in the county of

Cumberland; and by her will duly executed, devised her messuage or tenement, called Catlowdy, to her daughter Ann, the wife of John Milbourn, for her life with power to dispose thereof by will. Lucy Dixon died so seised, on the 15th of June 1797. At the time of making her will, and also of her death, both Catlowdy and Simeons Onset were occupied as one farm, being in the possession of the same person as tenant from year to year of the whole, under one rent; which person continued in possession as tenant until the year 1807. From the time of the death of Lucy Dixon, Ann Milbourn, and John Milbourn her husband, contending that Simeons Onset passed by this devise, received the rents of both estates during her life. Ann Milbourn died in 1801, and after her death, her husband John Milbourn received the rents and profits both of Catlowdy and Simeons Onset, as tenant by the curtesy until his death, which took place in June 1815. In 1807, the said John Milbourn granted a lease of the two tenements to John Forster and Adam Forster for nine years, under which the lessees held the possession, and paid the rent to John Milbourn during his life; the last rent which was paid by them to John Milbourn was at Whitsuntide 1815, and then due, which was subsequently to the death of John Milbourn Dixon, the other obligor, which took place on the 27th of April 1815. The obligor John Milbourn Dixon was the heir at law of Lucy Dixon, and he, in Hilary Vacation 1815, served a declaration in ejectment upon the tenant in possession of Simeons Onset, claiming it as heir at law of Lucy Dixon, but he died as before stated, on the 27th of April 1815, and no further proceedings took place therein. The defendant, after the death of his father, brought another ejectment, and after obtaining a judgment by default, recovered the possession of Simeons Onset in Trinity Vacation 1815. Afterwards one Isaac Milbourn, the son of the said Ann Milbourn, brought an ejectment for the same premises, which was defended by J. M. Dixon the present defendant, upon the trial of which a verdict was found for the defendant, and a rule *nisi* having been obtained to set aside that verdict, the Court of King's Bench upon argument discharged the rule, being of opinion that Simeons Onset did not pass either by the will of Lucy Dixon or of Ann Milbourn. The question for the opinion of the court is, whether the present defendant took Simeons Onset by descent from his father.

Patteson, for the plaintiff.

Tindal, contra.

ABBOTT, C. J. I am of opinion that the verdict on the last issue must be entered for the plaintiffs. It is clear that if the obligor was ever actually seised of the estate in question, for however short a time, the defendant takes it by descent from him. But the seisin of the obligor must be shown to have been a seisin in fact. That is also necessary to make a *possessio fratis*, so as to cause the descent of an estate to a sister of the whole blood, in preference to a brother of the half blood; and therefore whatever seisin suffices in the latter case will

suffice to charge the defendant in this action. Adverting to the doctrine on this point in Co. Lit. 15 a, we find it laid down thus: "If the father maketh a lease for years, and the lessee entereth, and dieth, the eldest son dieth during the term, before entry or receipt of rent, the youngest son of the half blood shall not inherit, but the sister; because the possession of the lessee for years (and a tenant from year to year is to be considered a lessee for years for this purpose,) is the possession of the eldest son so as he is actually seised of the fee simple, and consequently the sister of the whole blood is to be heir." This establishes that the possession of a tenant for years, being a rightful possession, is considered in law as the possession of the heir, and therefore gives him a seisin in fact. On the authority of this doctrine, which has been very often recognized in other cases, I think that we are bound to say that the obligor, J. M. Dixon, was for a time seised in fact of Simeons Onset, and consequently that the defendant had the land by descent from him, and is thereby rendered chargeable in this action.

BAYLEY, J. It is clear on which side the justice of this case lies, for as heir either of Lucy Dixon or of his father, the defendant is certainly liable to discharge this bond. But still we must see that he is properly charged as heir of his father, in order to give judgment for the plaintiffs in this action. It seems to me that the taking of the esplees by the tenant is a taking for the person seised of the freehold. In *Ratcliffe's Case*, 3 Co. 42, there is this passage relating to the doctrine of *possessio fratris*, "If the elder son enters, and by his own act hath gained the actual possession, or if the lands were leased for years, or in the hands of a guardian, and the lessee or guardian possess the land, there the possession of the lessee or guardian doth vest the actual fee and freehold in the elder brother." Where there is no one in possession at the death of the ancestor, there must be an actual entry by the heir to give him the seisin in fact. But when there is a tenant, his possession becomes that of the heir immediately on the death of the ancestor. The subsequent misconduct of the tenant in paying rent to another person, or the mistake of the heir as to his rights, cannot by relation alter the nature of the seisin which he before had. In this case, therefore, I am of opinion that the defendant took the land in question by descent from his father, and that the verdict on the last issue must be entered for the plaintiffs.

HOLROYD, J. I think that the defendant is liable to this action as heir of his father, having received lands by descent from him, his father having been seised of them in fact. Lord Coke puts the two cases of a man dying seised of lands in his own possession, and of lands in the possession of a tenant for years. If he is in possession himself, the freehold descends on the heir, and he is immediately seised in law, but not in fact. In Co. Lit. 277 a, speaking of an abator, he says: "Abate is both an English and French word, and signifieth, in its proper sense, to diminish or take away; as

here by his entry he diminisheth and taketh away the freehold *in law* descended to the heir." And again: "A disseisin is a wrongful putting out of him that is *actually* seised of a freehold. An abatement is when a man died seised of an estate of inheritance, and between the death and the entry of the heir an estranger doth interpose himself, and abate." So that if a man die seised of land in his own possession, and the heir does not enter, and a third person does, that which would have been a disseisin if the heir had entered, is an abatement. Again, in Co. Lit. 243 a, it is said, that if the ancestor leases for years, and dies, the possession of the lessee for years maketh an *actual* freehold in the eldest son. Thus, the case of an ancestor dying seised of lands in the possession of a tenant for years, is, in this respect, put on a different footing from his dying seised where there is no tenant; and in the former case the heir has such a seisin as renders the land descendible from him. And if there be an actual seisin in the heir, that will not be defeated *ab initio* by a subsequent neglect on his part to claim rent, or on the part of the tenant to pay it. The lessee was bound to pay rent to the lessor and his heirs, and therefore cannot be permitted to say that he took the esplees for any one else. The defendant in this case then must claim the land by descent from his father, the obligor, and is liable to be charged with the bond debt.

LITTLEDALE, J. I also am of opinion that the plaintiffs are entitled to recover on the third issue. If the obligor was ever actually seised, the defendant takes by descent from him. At the moment of Lucy Dixon's death, the obligor did become actually seised, for the possession of the tenant for years is the possession of the owner of the freehold. In the old entries of pleadings in real actions leases for years are never noticed; it is never said that the land descended from A. to B. subject to a term. In those days it was considered that the tenant was in the nature of a bailiff or servant, and therefore that he took the esplees for the benefit of the owner of the freehold. But stress has been laid on the fact of rent being paid to a third person. That, however, makes no difference. Although no rent was paid to the obligor, still at the moment of Lucy Dixon's death the possession of the tenant was the possession of her heir. He then became immediately seised in fact. It is immaterial to this question whether he was afterwards disseised or not, the land descended from him to the defendant, who is therefore liable to discharge the bond of his ancestor.

Judgment for the plaintiffs.[1]

[1] Cf. *Goodtitle* v. *Newman*, 3 Wils. 516.
The English Law of Descent was changed by the St. of 3 & 4 Wm. IV. *c.* 106.
For the American Statutes of Descent, see Stimson, Am. Stats. §§ 3100–3155.

SECTION II.

BREAKING DESCENT.[1]

A. *By Deed.*

Co. Lit. 12 b. It is necessary to be known in what cases the heir of the part of the mother shall inherit, and where not. If a man be seised of lands as heir of the part of his mother, and maketh a feoffment in fee, and taketh back an estate to him and to his heirs, this is a new purchase, and if he dieth without issue, the heirs of the part of the father shall first inherit.[2] If a man so seised maketh a feoffment in fee upon condition, and die, the heir of the part of the father, which is the heir at the common law, shall enter for the condition broken, but the heir of the part of the mother shall enter upon him, and enjoy the land. A man so seised maketh a feoffment in fee reserving a rent to him and to his heirs, this rent shall go to the heirs of the part of the father; but if he had made a gift in tail, or a lease for life reserving a rent, the heir of the part of the mother shall have the reversion, and the rent also as incident thereunto shall pass with it; but the heir of the part of the mother shall not take the advantage of a condition annexed to the same, because it is not incident to the reversion, nor can pass therewith. If a man had been seised of a manor as heir on the part of his mother, and before the Statute of *Quia emptores terrarum*, had made a feoffment in fee of parcel to hold of him by rent and service, albeit they be newly created, yet for that they are parcel of the manor, they shall with the rest of the manor descend to the heir of the part of the mother, *quia multa transeunt cum universitate quæ per se non transeunt.* If a man hath a rent-seek of the part of his mother, and the tenant of the land granteth a distress to him and to his heirs, and the grantee dieth, the distress shall go with the rent to the heir of the part of the mother, as incident or appurtenant to the rent, for now is the rent-seek become a rent-charge.

[1] See Watkins on Descents, *c.* 5.

[2] But here Lord Coke must be understood to speak of two distinct conveyances in fee; the *first* passing the use as well as the possession to the feoffee, and so completely divesting the feoffor of all interest in the land; and the *second* regranting the estate to him. For if in the first feoffment, the use had been expressly limited to the feoffor and his heirs, or if there was no declaration of uses, and the feoffment was not on such a consideration as to raise an use in the feoffee, and consequently the use resulted to the feoffor, in either case he is in of his *ancient use*, and not by purchase. — Harg. note.

Co. Lit. 13 a. A man so seised as heir on the part of his mother maketh a feoffment in fee to the use of him and his heirs, the use being a thing in trust and confidence shall ensue the nature of the land,[1] and shall descend to the heir on the part of the mother. A man hath a seigniory as heir of the part of his mother, and the tenancy doth escheat, it shall go to the heir of the part of the mother. If the heir of the part of the mother of land whereunto a warranty is annexed is impleaded and vouch, and judgment is given against him, and for him to recover in value, and he dieth before execution, the heir of the part of the mother shall sue execution to have in value against the vouchee, for the effect ought to pursue the cause, and the recompense shall ensue the loss.

GODBOLD *v.* FREESTONE.

Nisi Prius, Common Pleas. 1694.

[*Reported* 3 *Lev.* 406.]

Ejectment, and Not guilty, tried before *Holt*, Chief Justice, at Suffolk Assizes, he being of opinion for the plaintiff but doubting, a verdict was by his direction given for the plaintiff, but by consent of parties a case was made to be argued before him at his chambers at Serjeants-Inn, and according to his opinion there, either the judgment to be entered or the verdict to be stayed; and the case was this. A man seised of lands by descent *a parte materna*, makes a feoffment of all the lands to uses, viz. of Blackacre to the use of himself for life, the remainder to his wife for her life, the remainder to the heirs of his body on his wife begotten, the remainder to his right heirs. And of Whiteacre to the use of himself for 99 years if he so long lived, the remainder to trustees for his life, remainder to his wife for her life, remainder to his first and so to his tenth sons in tail, remainder to him and his heirs; the husband and wife are both dead without issue; and if the heirs *a parte paterna* or *a parte materna* should have the lands? was the question. And now upon argument at his chamber he changed the opinion he was of at the assizes, and held that the heir *a parte materna* should have the whole; and he did not make any difference between the cases, though the one is to himself for life, and the other for years: and Co. Lit. 13, 23, was cited, that where one takes an estate to himself for years, the remainder to his heirs, this is a new estate in him and not the ancient reversion; otherwise when he takes an estate for life, the remainder to his heirs; and Hob. 33 and Dy. 134 a, 163, where it is held, that when a man seised *a parte materna* makes a feoffment, or levies a fine, &c. and expressly declares the use to him and his heirs; this shall be to the use of his heirs *a parte paterna:*

[1] The better reason seems to be, that the use being the same as it was before the feoffment, it is the old use which continues. — Harg. note.

otherwise where he does not expressly declare the use, but levies a fine, &c. without an express declaration of the use, there the use shall be the same it was before without any alteration. But on the other part were cited, 5 E. 4, 7, 2 Co. *Bingham's Case*, that it is all one be the use expressed or not; the word heirs shall be heirs of the same quality as before: and of that opinion was the Chief Justice, and ruled the *postea* to be delivered. But the heir *a parte paterna*, not being satisfied with this opinion, brought a new ejectment, which is entered Hill. 6 W. 3, C. B. Rot. 306, where this whole matter was found specially, and there, upon argument and the authorities before recited, judgment was given by the whole court, viz. TREBY, NEVIL, and the two POWELS, justices, for the heir *a parte materna* for the whole: and they did not differ the cases where the estate was limited to the ancestor for years, or for life, the remainder to him in fee, for in both these cases the fee is the old reversion and shall go to the heirs *a parte materna*. Nor did they admit the difference where the use is expressly limited by the deed, or implied by law without any express limitations; but that in both cases the fee remains in the donor, and was never drawn out of him. And that it neither merged the estate for life or for years, but that both are preserved by the mesne remainders over, which come between those estates and the reversion, as was held in the *Earl of Bedford's Case*, Poph. 3; Mo. § 719, 2, and Pasch. 179; Pl. 17, Roll. 2 Abr. 418, the same case; where till John Lord Russel in whom the next reversion in tail was, both the term for years and also the reversion in fee stood distinct in the earl, viz. the term for 40 years and the reversion in fee; and in *Plunket and Holme's Case*, *intrat'* Hill. 1658, Rot. 521, B. R. *sed adjornat'* Mich. 13 Car. 2, where a feme devised lands to her son and heir Thomas, and if he died without issue living Leonard, to Leonard and his heirs; but if he had issue living at his death, to him and his heirs, there the fee descending upon Thomas did not merge his estate for life, but it was preserved by the contingent possibilities coming between his estate for life and the fee; and seeing that Holt had before delivered his opinion the same way, no writ of error was brought, and so the case rested. *Pemberton* for the heirs *a parte materna*, *Levinz* for the heirs *a parte paterna* in both places.[1]

GODOLPHIN *v.* ABINGDON.

CHANCERY. 1740.

[*Reported* 2 *Atk.* 57.]

WHERE, said LORD CHANCELLOR [LORD HARDWICKE], a limitation is to A. for life, to his wife for life, to trustees to preserve contingent remainders, to the first and every other son in tail, remainder to his

[1] And see *Abbot* v. *Burton*, 2 Salk. 590.

own right heirs; it will be absurd to say, that by a conveyance of lands, or by use, or by devise, the last limitation shall make the right heirs purchasers, and by that means prevent the reversion from being assets to satisfy the son's debts; for according to the doctrine laid down in the case of *Counden and Clerke*, Hobart 29, the limitation to the right heirs will be but a reversion, and will vest also in the son; for it is a positive rule, that a man cannot raise a fee-simple to his own right heirs, by the name of heirs, as a purchase, by any form of conveyance whatsoever. The same case is reported in Moore 860, but the point is wrong stated.[1]

B. *By Devise.*

BEAR'S CASE.

COMMON PLEAS. 1588.

[*Reported* 1 *Leon.* 112.]

A FORMEDON in the descender was brought by Samuel Bear, James Bear, and John Bear of lands in gavelkind; and the warranty of their ancestor was pleaded against them in bar, upon which they were at issue, if assets by descent. And it was found by special verdict, that Thomas, father of the demandants, was seised in fee of the lands supposed to be descended to the demandants, being of the nature of gavelkind, and devised the same to the demandants, being his heirs, by the custom, and to their heirs equally to be divided amongst them: And if the demandants shall be accounted to be in of the lands by descent, or devise, was the question; for if by devise, then they shall not be assets. *Anderson*, Let us consider the devise by itself without the words (equally to be divided amongst them). And I conceive that they shall be in by the devise, for they are now joint-tenants, and the survivor shall have the whole, whereas if the lands shall be holden in law to have descended, they should be parceners, and so as it were tenants in common. And although the words subsequent, equally amongst them to be divided, makes them tenants in common, yet that doth not amend the matter; and so also was the opinion of WINDHAM and RHODES, Justices.[2]

[1] On the descent of the equitable fee when land is settled in trust for the settlor and his heirs, see Ames, Cases on Trust, *c.* 8, § 9, p. 496. Cf. also *Davis* v. *Kirk*, 2 K. & J. 391, p. 29, *post*.

When the legal estate descends from one parent, and the equitable from the other, the land descends according to the legal estate. "There is no equity between the different classes of heirs." — *Per* LEACH, V. C., in *Langley* v. *Sneyd*, 1 S. & St. 45, 55 (1822), and see *Goodright* v. *Wells*, 2 Doug. 771; *In re Douglas*, 28 Ch. D. 327.

[2] *Gilpin* v. *Hollingsworth*, 3 Md. 190 (1852), *accord*.

CLERK *v.* SMITH.

COMMON PLEAS. 1699.

[*Reported* 1 *Salk.* 241.]

IN ejectment on a special verdict the case was, J. S. devised lands to his daughter's son [who was also his heir] and to his heirs, upon condition that he should pay £200 to such a person out of the said lands, as the wife of the devisor would appoint by her deed. The grandson entered, and the wife made no appointment; then the grandson died seised, leaving an heir *a parte materna*, under whom the plaintiff claimed, and an heir *a parte paterna*, under whom the defendant claimed. The question was, Whether the grandson was in by descent, or in by purchase under the will: And it was adjudged, that he was in by descent, and not by purchase, for the devise gives him the same estate the law would have given him, under a possibility of being charged, which never happened; by consequence, as the grandson took it as heir *a parte materna*, he shall transmit it in the same manner to his heirs *a parte materna:* And TREBY, C. J., and POWELL, J., denied *Gilpin's Case*, Cro. Car. 161. *Vide* 2 Mod. 286; Dy. 124; 3 Leon. 64, 70; Cro. El. 833, 919; Mo. 644; Vau. 271; Dy. 371; Hard. 204; 1 Roll. Abr. 626.

SCOTT *v.* SCOTT.

CHANCERY. 1759.

[*Reported Ambl.* 383.]

SCOTT devised to Henry, his eldest son, and only son by a former wife, and to his heirs and assigns, all other his real estate not before devised: nevertheless, in case he should die without issue, not having attained 21, then, from and immediately after his death under age and without issue, unto the testator's son William, and the heirs male of his body, with remainders over.

The eldest son attained 21.

The specialty creditors (not having a lien on the real estate) having exhausted the personal estate in satisfaction of their demands, the legatees contended to stand in their place, and come upon the real estate.

Q. Whether the eldest son took by devise or descent? In the latter case, the legatees would be entitled; in the former, not.

Henley, Lord Keeper, after having taken time to this day, gave his opinion, That the eldest son took by devise, as having under the will a different estate than would have descended to him, the one being pure and absolute, the other not.[1]

ALLEN *v.* HEBER.

King's Bench. 1748.

[*Reported* 1 *W. Bl.* 22.]

Action of debt on the bond of the father, to whom the defendant is heir. Plea, *Riens per descent.* The fact was, that the father had devised his lands to the defendant charged with debts. *Qu.* If this makes him a purchaser? For plaintiff: held, Hob. 30, that it will not make the heir a purchaser. But if the tenure or quality of the estate were altered, it had been otherwise: Dyer 124; Styl. 148; *Hedger and Row*, 3 Lev. 127, a devise to heir *ex parte materna* of no effect. Moor 644; Cro. Eliz. 919; Lutw. 797; Salk. 241. For defendant were cited Cro. Car. 161; 2 Mod. 286, *Brittam and Charnock.*

Per totam Curiam. If the tenure or quality of the estate be altered, the heir is a purchaser; but a charge on the estate does not alter the manner of the heir's taking the land. A devise is void, where it gives the same as would be taken by descent; 1 Ld. Raym. 728.

Judgment for the plaintiff.

HURST *v.* WINCHELSEA.

King's Bench. 1759.

[*Reported* 1 *W. Bl.* 187.]

This was a case stated from Chancery for the opinion of the Court of King's Bench, and appeared to be this,—Thomas Herbert, by will duly executed, devised to his wife Elizabeth all his lands, &c. in fee-simple. — Elizabeth (on his death) married a second husband; but, previous to such second marriage, settled the said estates to use of herself for life; then to Thomas Herbert, her own son by the first marriage, for his life, and so on to his issue in strict settlement; then in remainder to such person or persons as she should by deed or will, notwithstanding any coverture, appoint [and in default of such

[1] s. c. 1 Eden, 458. See Serjeant Hill's MS. note quoted in note to this case in Blunt's edition of Ambler. The learned serjeant says: "The determination in this case is right; but the reason given for it is wrong." — Ed.

appointment, to the said Elizabeth, her heirs and assigns].[1] After the second marriage she made a will, wherein she devised *all her estate* to said Thomas Herbert (charged with several pecuniary legacies), and died, living her second husband. Afterwards, Thomas Herbert died, *sans* issue and intestate. And the question was, Whether this estate should descend to his heir, *ex parte paterna* or *materna?* or whether the remainder in fee vested in him by descent from Elizabeth his mother, in which case it would go to the maternal heir; or whether it vested by the devise, operating as an appointment under the settlement, in which case, Thomas Herbert would be a purchaser, and the lands would descend to the paternal heir.

The COURT, after hearing two arguments, declared they should certify that it descended to the maternal heir of Thomas Herbert; it being a known rule, that a common devise in fee-simple to an heir-at-law, gives him no estate at all, he being adjudged in by descent; and it having also been determined in the case of the *Duke of Marlborough and Lord Godolphin*, in Chancery, 2 Ves. S. 61, 73, that an appointment by will is subject to the same rules as a common devise.

SMITH d. DAVIS *v.* SAUNDERS.

COMMON PLEAS. 1771.

[*Reported* 2 *W. Bl.* 736.]

EJECTMENT: special case. Robert Everden, seised in fee of the lands in question and other lands, on the 14th of September, 1753, devised the lands in question "to his son, Henry Everden, and his wife, Elizabeth, for their joint lives, and the survivor of them; and, after the decease of the survivor, to their eldest son and his heirs forever; and, if they *leave* no male issue, to their daughters and their heirs forever. And if they die without issue, then he gave, bequeathed, and devised the same to his right heirs forever." Afterwards he devised to his son-in-law, Humphrey Davis (the lessor of the plaintiff), "All his estates, lands, tenements, and premises thereunto belonging, *not thereinbefore devised, bequeathed*, &c., to hold to him, his heirs, and assigns forever;" in trust to sell the same, and, after payment of so much of his debts, funeral expenses, and all other necessary expenses as his personal estate could not extend to pay, out of the produce thereof to pay certain specific and pecuniary legacies to his children; and to divide the residue equally among his three sons and five daughters. And then devises "all the residue and remainder of his estate, both real and personal, of what nature or kind soever, unto his son-in-law, the said Humphrey Davis, his heirs, executors, administrators,

[1] This is the correct form, as appears from Lord Kenyon's note of the case, 2 Kenyon, 444.

and assigns forever." The testator died on the 21st of February, 1754, leaving Henry, his eldest son and heir, two other sons, and five daughters. Henry (who survived his wife, Elizabeth) died on the 17th of September, 1769, and never had any issue. *Qu.* Whether the said Humphrey Davis, under either of the clauses in this will, is entitled to recover?

Glyn, for the plaintiff.

Davy, for defendant.

De Grey, C. J. There are some propositions clearly established, which will give light to this case. Personal estate, being of a fluctuating nature, must go to a residuary legatee in the same state as it happens to be at the death of the testator. Not so real estates, which are of a more permanent nature; for there only such will pass by a residuary devise as the testator really meant to devise at the time of making his will. Therefore, in the case of *Doe and Underdown* [Willes, 293], an estate that lapsed afterwards by the death of a devisee did not go to the devisee of the *residuum*. Again it is certain, that a reversionary interest, which the testator then has, will (if nothing be mentioned of it) pass by a residuary devise. And there may be cases where a reversion of an estate devised to a man's own heirs may pass to a residuary devisee under the general clause, and others where it will not. It is always a question of construction; and in *Doe and Russel* I think the court construed it right. No argument is to be drawn from the position of clauses in a will, but all are to be taken together. Neither is the present question upon the *legal operation* of a devise to a man's right heirs, but upon the testator's *intention* by such devise. It is said that the devise to the heir is nugatory, and must be rejected. But there is as much reason to reject the residuary devise as nugatory as the other. It is said that the devise of the reversion being a nullity, it falls into the *residuum* as being undevised. But it would rather fall under the second clause; for all undevised estates are subject to the trust, which this is not now contended to be. The whole is merely a question of intention, and you can never infer an intention from a sweeping residuary clause. The intention of the testator is clearly, that his heir at law should have the land, failing the issue of his body. As for authority: in *Amesbury and Brown*, 25th May, 1750; testatrix, having four sisters, devises particular estates to them, with remainder to her own right heirs. Afterwards, a general residuary clause to one of the sisters; and [she] had no other real estate. One of the particular estates determines. Lord Hardwicke held, that the reversion did not pass by this residuary clause, and that though the devise may not operate to make the heir take it by purchase, yet it is in the nature of an exception out of the residuary clause. This case was recognized and approved by Lord Northington in *Robinson and Knight*, 12th July, 1762, 2 Eden, 155, which was also a case of a residuary devise, and determined upon intention merely. I am therefore of opinion with the defendant.

GOULD, J., of the same opinion.

BLACKSTONE, J., of the same opinion. Here are three dispositions. The first clause devises specific lands to his son and daughter in tail, with remainder to his own right heirs. The second devises such estates in point of locality as he had not before devised, to Davis, to be sold for the benefit of his younger children. The estate in question cannot come under this description, for it is previously devised. The third clause devises such estates, as well in point of interest as locality, as he had not before devised, to Davis absolutely in fee. For *residue* and *remainder* are relative expressions, and must refer to what had been before devised. Whether the devise of the reversion to his right heirs could, in point of law, take effect or not, it is in fact devised; and by such devise *de facto* it is (as Lord Hardwicke expresses it) excepted out of the general residuary clause. The residuary devise would extend to any latent reversions he might have in him, but not to those which he has expressly disposed of otherwise, unless there be special circumstances, as in *Doe and Russel.*

NARES, J., having been of counsel in the cause, gave no opinion.

Judgment for the defendant.[1]

CHAPLIN *v.* LEROUX.

KING'S BENCH. 1816.

[*Reported* 5 *M. & S.* 14.]

COVENANT for not repairing, on a lease for 21 years, which expired at Lady Day, 1807, made by the father of the plaintiff to the defendant. And the plaintiff declares, that his father was seised of part of the demised premises in fee, and of the residue, by copy of court-roll held of the manor of Tottenham in fee-simple, at the will of the lord, according to the custom of the manor; that he surrendered the copyhold part to the use of his will, and by his will devised the whole premises to his wife for life, provided she did not marry; and died seised, leaving his said wife, and the plaintiff, his only son and heir at law, him surviving; and that afterwards, and before the breach of covenant, the said wife died, and the said demised premises, with the appurtenances, *descended to the plaintiff, as only son and heir at law of the lessor*, whereby the plaintiff was, and continually hitherto hath been, and still is seised, &c.

Plea, that the demised premises, with the appurtenances, did not descend to the plaintiff as the only son and heir at law of the lessor, *modo et forma.*

On the trial, at the sittings after last Trinity Term, a verdict was found for the plaintiff, subject to the opinion of the court, on the ques-

[1] S. P. *Doe* d. *Davis* v. *Saunders*, Cowp. 420 (1776).

tion whether the plaintiff took by descent, or by devise under the will of his father, by which the father devised all his lands, as well freehold and leasehold, as copyhold, with their appurtenances, unto his wife for life, provided she did not marry, with power to grant building leases for 61 years, charged during that time with the payment of the yearly sum of £50 to his son, the plaintiff, if he should so long live, by four equal quarterly payments, and also finding him in board, washing, and lodging during his stay at the university, and during his studies in the profession of the law in London or otherwise, until such time as he should arrive to the age of 27 years; and also charged with the payment of the further yearly sum of £30, during his wife's life, unto his daughter Sarah, the wife of George Thompson, if she should so long live, and payable quarterly; and in case his said wife should marry, then and from the time of such marriage he devised all his said lands unto his said son, charged with the payment of the said yearly sum of £30 unto his daughter Sarah, in like manner as if his wife had not married; and also charged with the payment of the yearly sum of £100 to his wife during her life, payable quarterly; and from and after the decease of his said wife, he devised his said estates unto his said son, charged with the payment of the yearly sum of £100 unto his daughter Sarah during her life, payable quarterly. And upon the decease of the survivor of his wife and daughter he bequeathed the sum of £1500, to be equally divided between all the children of his said daughter then living, if more than one, and if there should be only one child, then the whole to go to such child; and in case she should not have any children or child living at the time of her decease, then he gave the said sum of £1500 to be disposed of by his said daughter in such manner as she should, by any deed or will attested by two witnesses, notwithstanding her present or any future coverture, appoint; and for want of such appointment the same to go to her executors and administrators. And it was his will that the said sum of £1500 should be paid within one year after the decease of his wife and daughter; and in default of payment, either of the yearly sum of £100 to his daughter in manner above mentioned, or of the sum of £1500, within the time above specified, he devised all his said lands, as well freehold and leasehold as copyhold, with the appurtenances, unto the said G. Thompson, his executors, administrators, and assigns, in trust, upon such default of payment, to raise and pay the said yearly sum of £100 out of the rents and profits, and the said sum of £1500 by sale or mortgage of a sufficient part of his said lands, and subject to the said several charges and trust he gave the said lands, after the decease of his wife, to his said son, his heirs, executors, administrators, and assigns. The testator's said daughter is still living.

If the court should be of opinion that the plaintiff took by descent, the verdict to stand; if not, a nonsuit to be entered.

Gaselee, for the plaintiff.

Marryat, contra.

Lord Ellenborough, C. J. If the estate devised to the trustee be an executory devise, the law will cast the estate of the heir on him by descent, until the contingency happens; if the trustee's estate be not an executory devise, I do not see that there is necessarily such an estate of freehold given to him as to break in upon and alter the quality of the estate which the heir would otherwise take.

Bayley, J. I am of the same opinion. In all these cases it is desirable that the heir should be in by descent, rather than by purchase; because it is convenient that the property should be assets in the hands of the heir. And the general rule is, that where the heir takes the same estate in nature and quality which the law would give him, he takes by descent. It appears by Mr. Ford's MS. note of *Allam* v. *Heber*, though this is not noticed either in Strange (Str. 1270), or Blackstone's report of that case (1 Black. 22), that the court denied *Gilpin's Case*, Cro. Car. 161, to be law. Impeached, therefore, as *Gilpin's Case* is, as well by what I have just remarked, as by the authority of Treby, C. J., and Powell, J., it is competent to us to examine the case, and in examining it to ask this question: whether a fee mounted upon a fee turns the first into a base fee? I think that it does not. Here the plaintiff's estate was a good estate in fee, the last an executory devise.

Holroyd, J., being connected with the parties, declined giving any opinion.[1]

BIEDERMAN *v.* SEYMOUR.

Chancery. 1840.

[*Reported* 3 *Beav.* 368.]

The Master of the Rolls. [Lord Langdale.][2] In this case the question reserved was, whether the real estate which the testator devised to his heir at law, is to be taken as real assets, for payment of debts, in priority to real estates, by the same will devised to other persons.

The devise to the heir is made subject to the payment of an annuity of £50 to the testator's sister during her life, and after her death to the payment of £1,000 to her two children.

Notwithstanding the devise, and notwithstanding the charges, the heir takes by descent. *Chaplin* v. *Leroux*, 5 M. & S. 14. For the purpose of making him take otherwise than by descent, the devise is said to be void; and it is argued for the defendants that the devise is void for all purposes: that no intention can be applied to it: that the

[1] In *Doe* d. *Pratt* v. *Timins*, 1 B. & Ald. 530 (1818), there was a devise to the heir, with an executory devise over in case he should not reach his majority. It was *held* that he took by descent. — Ed.

[2] The opinion only is given.

attempted devise must be treated as a mere nullity, and the estate therein comprised be considered merely as descended estates, and therefore as assets to be applied for the payment of debts, in priority to estates effectually devised.

But whatever may be the origin of the rule, which gives to the heir by descent, that which the testator has intended to devise; whether the rule be derived from the supposed application of a principle that a man shall not have by gift that which is his own without gift, as some have supposed; or whether the rule be adopted for the benefit of third persons, as of the lord for the preservation of tenure, or of creditors for the payment of their debts; or simply, as Mr. Justice Bayley said in *Chaplin* v. *Leroux*, because it is convenient that the property should be assets in the hands of the heir; there seems to be no reason, why, as against the heir, the rule should be extended further than the principle requires.

It cannot be said of estates expressed to be devised to the heir, as of estates not mentioned in the will, that they are "quite out of the scope of the testator's intention, perfectly beside and independent of it," 2 Bro. C. C. 262; it is indeed clear that an estate which the testator says he devised to the heir, is within the testator's intention, and meant to be a benefit to the heir. There is nothing illegal in that intention, and if the rule be founded on the regard due to third persons, as creditors or otherwise, there seems no reason for its application between the heir and other objects of the testator's bounty; and if the effect of the devise be to procure for the heir a contribution from the other devised estates towards payment of debts, which would otherwise have had to be borne by descended estates alone, it cannot be said that the heir obtains by gift something which was his own, without gift.

Courts of justice ought to carry into effect the intentions of testators as far as they can consistently with the rules of law; and in this case, although the rule of law makes the devised estates assets in the hands of the heir, and the creditors may, therefore, resort to this estate in priority to others, and without being embarrassed with the necessity of seeking contribution from other devisees; yet, as it appears by the expressions which the testator has used, to have been his intention that the devisee, who is heir, should partake of his bounty as well as other devisees, there seems to be no reason why, without prejudice to the claims of creditors or others, the heir should not enjoy the like benefit which is given to other devisees; or why those who claim under the will, and do not appear to be more objects of the testator's bounty, should be permitted to defeat the expressed intention in favor of the heir.

I do not think that the testator's intention can be excluded from the consideration of this question. The intention is not to prevail against the rule of law for the benefit of third persons. A testator cannot, as against creditors, exempt his personal estate from payment of his debts, or prevent his real estates from being assets, by devising them to his

heir; but we may collect from his will an intention, that, as amongst those claiming under the will, the personal estate, or any portion of the real estate, shall be exonerated; and if there be an equal intention to give to devisees named, and the gift must be encroached upon by the liability of the subjects of them to pay debts, I think the doctrine that the heir, who is devisee, shall take by descent, does not afford a sufficient reason for saying, that the burden of the debts should not be borne ratably by the devisees, although one of them is heir; and I am of opinion that although the creditors have a right to resort to the estate devised to the heir. in priority to the other devised estates, yet that the heir will be entitled to contribution from the other devisees to the extent in which his estate may be exhausted by debts.

Mr. Pemberton and *Mr. Cankrien*, for the other devisees.

Mr. Dixon, for the heir at law.[1]

DAVIS *v.* KIRK.

CHANCERY. 1855.

[*Reported* 2 *K.* & *J.* 391.]

WILLIAM HARDING, by his will, dated in 1845, gave and devised all his freehold and copyhold estates to Anthony Davis, his heirs and assigns, to hold the same unto and to the use of the said Anthony Davis, his heirs and assigns, upon trust to sell all those three closes therein specifically described, and to stand possessed of the moneys to arise from such sale, upon trust to pay all the said testator's debts, funeral and testamentary expenses; and in the next place to pay the residue thereof to the said testator's wife, Ann Harding; and as to all the rest, residue, and remainder of the said testator's real estate thereinbefore given and devised to his said trustee, upon trust to pay the rents and profits thereof unto the said Ann Harding for her life; and, after her decease, upon trust to convey the said residue of his the said testator's real estate unto such person as should answer the description of his heir-at-law; and the said testator appointed the said Anthony Davis executor of his said will.

The testator died shortly after the date of his will, and the said Ann Harding, his widow, died in 1853.

At the time of his death, the testator William Harding was seised in fee of copyhold lands besides those mentioned in the will, which had descended to him *ex parte materna*, and these were now claimed by his heir-at-law, and also adversely by his heir *ex parte materna*.

Mr. W. M. James, Q. C., and *Mr. Jessel*, for the plaintiffs.

Mr. Rolt, Q. C., and *Mr. Speed*, for the heir *ex parte materna*.

Mr. Giffard, for other parties.

[1] *Ellis* v. *Page* (1851), 7 Cush. 161, is *contra*.

Mr. Willcock, Q. C., and *Mr. Karslake,* for the heir-at-law, who was also the customary heir of the testator.

Vice-Chancellor Sir W. Page Wood, without hearing the counsel for the defendants, gave judgment as follows : —

I do not think that there is any doubt about this case. I have been looking at the case of *Harris* v. *The Bishop of Lincoln*, 2 P. Wms. 135. The report of it is in the shape of an argument between the bar and the court, counsel making an observation and the court answering it. I find there "it was objected, that, if the will should be construed in such manner as to entitle the heir of the mother's mother to the estate, such will would be void and nugatory, and the testator all this while would be doing of nothing, because, without any will, the premises would go to the heir of the mother's mother, who was the heir-at-law to this estate, the heir of the mother's father having none of the blood of the first purchaser. To which the court said, that the testator giving by his will several annuities and charities, and then saying that the residue of the profits should go to the right heirs of the mother's side, it was the same thing as if he had said, 'so far I dispose of my estate, and let so much of it go from my heir who otherwise would have had it, but I will not dispose of it any further from the heirs at law of the mother's side, whence it came, and where it would go in case I should not give it away.'" In other words, the court treated it as not being a devise at all, but considered that the heir took by his better title; and that was the principle of the decision.

I think that the answer to the case of *Godbold* v. *Freestone*, 3 Lev. 406, which is the only case that touches this, is, that the use is the old use. Here the devise is an express devise, which vested the whole fee simple in the trustees, and gave it away from the heir. The whole estate is devised away from the heir, and the trustees are left to deal with the legal fee simple, and to convey it to such person as should answer the description of the testator's heir-at-law. The expression "heir-at-law" is somewhat strong; but, independently of that, the fact of the testator having devested the inheritable quality of the estate by breaking the descent entirely, and giving the estate to the trustees, and leaving them to find out the heir, has put them under an obligation to look upon the heir as a *persona designata*, and they cannot regard the inheritable quality of the estate, but they must find out the person who answers the description of heir-at-law of the testator. I think that there is not any authority precisely in point; but the principle must be, that, when once the descent is broken by a devise of the whole fee simple to trustees, upon trust to convey it to the testator's heir, they are bound to convey it to the person who is heir of the testator according to the common law.

Note. — "Upon recollecting the case on Mrs. F.'s will, lately laid before me by Mr. W., it now strikes me that the opinion I delivered upon it is, in one part, not well founded; and, though I have not the case, nor a copy of it, by me, my memory sup-

SECTION III.

POSTHUMOUS HEIR.

Co. Lit. 11 b. So it is if a man hath issue a son and a daughter, the son purchaseth land in fee and dieth without issue, the daughter shall inherit the land; but if the father hath afterward issue a son, this son shall enter into the land as heir to his brother, and if he hath issue a daughter and no son, she shall be coparcener with her sister.[1]

plies me with all that is necessary to enable me to make what, I think, the requisite correction.

"The devise by Mrs. F. to her two sons, if I remember right, was under a power in her marriage-settlement. Now, regularly, whoever takes under an *execution of a power* contained in any *conveyance or settlement*, takes under such *conveyance or settlement itself;* and, if this rule extended to the present case, both the sons must have taken as under the settlement, and consequently by *purchase;* in which case, their heirs, *ex parte paterna*, would have been clearly entitled to *the whole*. But the rule, it seems, does not hold in a devise, under such a power, to the *heir-at-law* of the party executing it, where such *heir* would have taken the *same estate by descent* from *that person* in default of execution of the power. Vide *Hurst* v. *The Earl of Winchelsea*, 1 Black. Rep. 187. For there, according to the common rule in respect to devises to an heir-at-law, such heir shall be in by descent, and not by purchase.

"This consideration only affects the *moiety* of the eldest son; for, as to that devised to the youngest, he could not take it otherwise than by *purchase*, as he was not *heir* of the testatrix; and, as he took by purchase, his share of course descended, either *immediately* from himself, or *mediately* through his brother (if his brother survived him), to his heir *ex parte paterna:* And, therefore, I think it clear, that the heir of the son, on the part of Mr. F. *their father*, is entitled to this moiety. But, as to the other moiety devised to the eldest son, it remains to be inquired, How the lands were limited by the settlement, in default of appointment by Mrs. F.? which, I believe, did not appear by the case stated. If they were not limited to her *in fee*, so that her eldest son would not have taken if there had been no will, then, I conceive, he took as under the settlement, by virtue of the execution of the power contained therein; for he could not, in that case, take by descent; and then, as he took by *purchase*, his moiety also descended to his heir *ex parte paterna;* and then the title to the *whole* will stand as supposed in my former opinion. But if the lands were, by *the settlement*, limited to Mrs. F. *in fee*, in default of appointment, so that her eldest son *would have taken as heir*, if she had not executed her power, then, I conceive, under the authority of the case above cited, he took by *descent*, and not by the will; unless a devise to an *heir-at-law, and another* as *tenants in common*, prevents the *descent* as to the moiety devised to such heir, and makes him take by purchase under the will.

"Now, I believe, in my former opinion, I supposed this circumstance of the *tenancy in common* to be an obstacle to his taking *by descent*, and that, to do so, he must have *taken solely as his mother held it*. But this latter proposition is certainly wrong; for, suppose a testator devises a moiety, or any other undivided share, of his real estate to a stranger, making no disposition at all of the remaining undivided share, such remaining share will of course descend to his heir-at-law, and he must hold it *in common* with

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[1] See *Bates* v. *Brown*, 5 Wall. 710.

GOODALE *v.* GAWTHORNE.

CHANCERY. 1854.

[*Reported* 2 *Sm. & G.* 375.]

THIS was the petition of Elizabeth Goodale, and of Mrs. Moss late Goodale, and her husband, praying that the sum of £273 2*s.* 10*d.* Consols, and £35 cash, might be divided into thirds, and two thirds thereof paid to the petitioners.

John Goodale, who was possessed of certain real estate in the county of Derby, died, on the 1st of April, as to the real estate now in question, intestate. At his death, his widow was enceinte of a son, who was born on the 29th of October, 1848. At the death of John Goodale, his sisters, the petitioners, were his presumptive co-heiresses at law.

A suit was instituted on the 18th of November, 1848, to administer

the devisee of the undivided share devised. It is clear, therefore, that an heir may take by *descent*, as *tenant in common* with a devisee, an undivided part of the estate which his ancestor *was solely seised of;* and it appears to me to be immaterial, whether the share he so takes is *expressly devised to him*, or left unnoticed, by the *will;* for, if expressly devised, he takes it in *common*, and, if not noticed, he takes it in *the same manner;* and a devise to two or more as *tenants in common*, is in effect a devise of one undivided part *to one*, and *of another undivided part to the other;* so that under such a devise to an heir and another as *tenants in common*, the heir takes as if *one undivided moiety* were devised to *the other*, and the residue to himself; that is, in the same manner as if no disposition at all of such residue had been expressed in the will; in which case he would have taken by descent; and therefore, the same estate being devised to him in such residue as he would have taken by descent, I think, the general rule, respecting devises to an heir, extends to it.

"It has indeed been held, that a devise to the *heir and another* makes the heir a purchaser; but that seems to be on account of the *joint tenancy* and benefit of *survivorship* to the stranger. And it appears, that under a devise to *two co-heirs*, they take as joint-tenants by the will, and not by *descent;* and so in a devise to them *in common*, they take *as tenants in common*, and not by *descent*. But, it is evident, under either of these tenures, they take *every part* of the land devised in a different manner than by *descent;* whereas, in the case of a devise to the heir *and another*, as *tenants in common*, the heir seems to take the *part devised to him*, just in the same manner as if it had been left *to descend* to him. I therefore, upon this consideration of the point, am of opinion, that the devise being to the two sons, as *tenants in common*, was no obstacle to the eldest taking his *moiety* by *descent;* and consequently, that if the lands were settled on his mother *in fee*, so as to descend from her to him, in default of appointment, he took his moiety by *descent*, and not by the will or settlement; and, in that case, his heir *ex parte materna* will be entitled to his said moiety." — Fearne, Post. Works, 128–132.

In *Ellis* v. *Page*, 7 Cush. 161 (1851), land was devised to trustees on certain trusts, and on failure of these trusts in trust to convey the land to the testator's heirs-at-law. The trusts failed, and it was held that the heirs took by descent, and not by devise, and that therefore, under a Massachusetts Statute, the land could be sold to pay legacies. The decision, it is submitted, is unsound: (1) because the devise of the legal estate to the trustees broke the descent, *Davis* v. *Kirk*, *supra;* (2) because even if the devise had been to the heirs directly, the doctrine of *Biederman* v. *Seymour*, *ante*, is good sense and good law.

the estate of John Goodale; and on the 12th of January, 1850, it was referred to the Master, to inquire and state what proportions of the rents and profits of the real estates of John Goodale, deceased, had been received by the trustees between the death of John Goodale and the birth of the posthumous son. On the 11th of February, 1850, Master Dowdeswell certified that the sum of £261 3*s.* 10*d.* had been so received and paid into court.

On the 11th of June, 1851, the widow of John Goodale elected to take an annuity secured by a bond of John Goodale, and her dower, instead of an annuity and legacy given by the will.

The question now raised was, whether the petitioners were entitled to two thirds of the fund in court, which arose from rents accruing between the death of the ancestor and the birth of the posthumous heir.

Mr. Wigram and *Mr. E. Webster*, for the petitioners.

Mr. Goodeve and *Mr. Selwyn*, appeared for other parties.

Mr. Amphlett, for the heir-at-law, was not called on.

The Vice-Chancellor. [Sir John Stuart.] The right of the sisters is admitted by counsel very properly to depend on their having been actually seised of the estate as heirs. The seisin being in them from the death of the ancestor up to the birth of the posthumous son, they were heirs in contemplation of law so long as the posthumous heir was unborn. Lord Coke, in his Commentary, 11 b, says that the descent cast upon the presumptive heir until the posthumous heir is born, does not confer an absolute heirship, but only one of a qualified kind. His words are (the case being that of an uncle), "True it is that the uncle in this case is heir, but not absolutely heir." It is certain that on the birth of the posthumous child, there was an end to the qualified seisin and to all right of entry on the part of the sisters, who had the qualified heirship until the birth of the posthumous child.

The law is settled, that, if during the period of this qualified heirship and seisin in the sisters they had entered and had received the rents, as they might have done, an action of account would not lie against them, and they would be entitled to retain what they had received, and which they had lawfully acquired.

If, however, they did not obtain possession of such rents, but the rents had remained unreceived by them, their seisin being gone on the birth of the posthumous child before they had received the fruits of their seisin — viz. the rents, the right to the rents in such case is in the absolute heir, who has a right to enter and distrain for them. That is what I infer from the principle as stated by Lord Coke; and the law, as settled in the case of *Doe* v. *Clarke*, 2 H. Bl. 399, considers an infant *en ventre sa mere* as born for all purposes which are for his benefit. Then, it is said, they might bring an action for the rent, but no authority has been cited in support of that proposition: and I apprehend that it would be impossible for them to maintain an action for the rent which the absolute heir had a right to recover by entry and

distress, as the proper owner of the freehold. Therefore there must be a declaration that the sisters are not entitled to the rents, which are the property of the posthumous son.

Costs of all parties out of the fund.

RICHARDS *v.* RICHARDS.

CHANCERY. 1860.

[*Reported H. R. V. Johns.* 754.]

VICE-CHANCELLOR SIR W. PAGE WOOD.[1] A singular point arises in this case. The question is whether the qualified heir (if I may use that term to describe the person who is heir between the death of an intestate and the birth of a posthumous heir) is entitled to rents which are not actually received before the birth of the posthumous heir. Such questions are not of frequent occurrence, and it is singular that the point should have arisen so recently as it has done in another branch of the court.

The ancestor in this case, Edward Priest Richards, who was entitled to certain estates in tail under a settlement, and to others in fee, died on the 12th of November, 1856. His posthumous child was born on the 23d of June, 1857. There were some peculiar circumstances with reference to a portion of the rents, but they do not affect the general question. All that it is necessary to say is, that there was certain property of the deceased held, as it appears, by tenants from year to year, so that no entry could have been made by Mrs. Treherne, and the question is, Who is entitled to the rents which accrued before the birth of the plaintiff? There is a very small amount of authority on the subject. There are certain expressions to be found in the old cases which perhaps afford some ground for the argument that the right of the qualified heir is limited to the rents actually received. The case in the Year Book of 9 Henry 6, the exact words of which are given in Watkins on Descent (page 185, note), was to this effect: A man, having issue a daughter, died, leaving his wife enceinte with a son; and the question was, whether the posthumous child could recover from the daughter the intervening rents; and the decision was "that the son should not have an account or any other remedy for the intermediate rents, because the entry of the qualified heir was lawful until the son was born." It is not specified there that the rents had been actually received, but the judgment denies the right of the posthumous heir to an account or to any other remedy.

Then, in *Goodtitle* v. *Newman* [3 Wils. 516], Lord Chief Justice De Grey paraphrases the passage from the Year Book thus: "If a man has

[1] Only the opinion which relates to the question of posthumous heirship is here given.

issue a daughter and dies, his wife being enciente, the daughter may lawfully enter, and if she die her heir may enter and take the profits for the time; and afterwards if the wife, being enciente by the ancestor paramount, is delivered of a son, the son may enter notwithstanding that the heir of his sister is in by descent; but he shall not have an action of account, or any remedy for the issues in the mean time before his birth, because that the entry was congeable until he was born."

It is not disputed that the posthumous heir has no remedy to recover the rents actually received before his birth; but in order to determine this case it is necessary to look into the principle on which the doctrine has been established that the qualified heir is entitled to take possession of the profits. The principle, which is very clearly stated by Watkins (page 185, note), in his comments on the case in the Year Book, seems to me to be the true one. He says, "When we consider that the daughter and her heir were justly entitled to the freehold till the son was born, it seems to follow of necessity that they were justly entitled also to the profits to enable them to discharge the services of the lands. While they were in possession of the feud they were certainly subject to the services, and the person discharging the services by right was certainly entitled to the profits."

That, I apprehend, is the real principle of the cases. The doctrine is of the strictest common law character. A Statute was passed to meet the case of posthumous children entitled in remainder. But the common law rule was, that some one must come in as heir immediately on the death, in order that there might be no vacancy of the freehold. During the period, therefore, that the posthumous heir was not in existence to perform the duties of tenant, the person on whom the law threw the burden was in consequence held entitled to that which flowed from the burden, namely, the enjoyment of the rents and profits. That principle is clearly independent of any question whether the rents are actually received before the birth or not, and one can easily see why the Legislature, when dealing with the subject, did not alter the law in this respect. Until the modern change in the law of descent, a qualified heir might have remained in possession of an estate for many years. If a son, being the purchaser of an estate, died in his father's life-time without having any brothers or sisters, he would have been succeeded by collaterals, and after an interval, possibly of many years, a sister might be born who would displace them, and she in her turn might be supplanted by a brother. It would have been singular in such a case to say that the successive takers should have no right to rents which had accrued during their respective tenancies, but which remained outstanding at their determination. The principle, therefore, I take to be that the qualified heir is entitled to the rents which accrue before the birth of the posthumous heir, whether actually received before that time or not.

Goodale v. *Gawthorne*, 2 Sm. & Giff. 375, seems to be the other way, but the report is very singular. Goodale is stated to have died

intestate as to certain estates, and one would have supposed that the legal estate descended. But the report goes on to say that there was a reference to the Master to inquire what rents had been received by the trustees between the death of J. Goodale and the birth of the posthumous son.

Now, it does not appear what trustees there were; but of course if the legal estate was in trustees, the whole doctrine as to the rights of the qualified heir was at an end, because it depends entirely upon strict legal principles, and had no other end than to keep the feud always full. I have assumed, that, in the present case, the lands were occupied by tenants under leases or from year to year, because, unless there was an estate for years outstanding, the qualified heir must have entered, in order to acquire any right to the rents; but as the contrary is not suggested, I presume, that, so far as any question of entry is concerned, she had duly entitled herself to them.

There are several authorities bearing incidentally on this subject, and the Vice-Chancellor, in his judgment in *Goodale* v. *Gawthorne*, refers to *Doe* v. *Clarke*, 2 H. Bl. 399, for the principle that an infant *en ventre sa mere* is considered as born for all purposes which are for his benefit.

This clearly cannot be so for all purposes, otherwise no question as to intermediate rents could ever have arisen, and it is difficult to see how the right of entry and distress could relate back to a time anterior to the birth. The law certainly is, that the qualified heir is entitled, at any rate, to all the rents actually received, and consistently with this it cannot be said that the heirship relates back for all purposes.

Do the tenants owe a double duty? On the contrary, just as the qualified heir owes the duty to the lord, so the tenants owe their duty to the qualified heir. The tenant cannot owe a duty to the unborn heir, whom the law does not recognize as the person to perform the services incident to the estate, and therefore not as the person to enjoy the benefits of heirship. The case of *Basset* v. *Basset* [3 Atk. 203], which was relied on, really seems to be in favor of the infant. Lord Hardwicke held that case to be within the meaning of the Statute, the estate being by way of remainder, though not to a person in the position expressly contemplated by the Statute; but he distinctly notices that the Statute says nothing about descent, and lays down in the very same case the doctrine, that, in the case of estates descended, the qualified heir is entitled to the intermediate rents. The present case comes within the second branch of that decision, and I shall make a declaration that all the rents which accrued during the period of suspense became the property of the qualified heir.[1]

Mr. Freeling, for the plaintiff.

Mr. C. T. Simpson, for the widow and administratrix of E. Priest Richards.

Mr. Cotton, for Mrs. Treherne.

[1] See *In re Mowlem*, L. R. 18 Eq. 9.

CHAPTER III.

OCCUPANCY.

SALTER *v.* BOTELER.

QUEEN'S BENCH. 1602.

[*Reported Moore*, 664.]

IN an action on the case on trover and conversion of certain cows, the defendant justified for rent *pur auter vie* granted to one, his executors and assigns, and showed how the grantee died intestate, living *cestui que vie*, and that the defendant took administration and distrained the cows for the arrears, and put them in an open pound, which was the conversion. The plaintiff demurred in law; and it was adjudged *pro querente*, because the administrator was not special occupant of this rent, but the rent was determined by the death of the grantee, yet the grantee could have granted or assigned it in his lifetime. And if the grant had been to the grantee and his heirs, the heir would be special occupant, as 8 Eliz. Dyer. And POPHAM said that if rent was granted *pur auter vie* with remainder over, and the grantee died, he in remainder would commence immediately, because the rent for life determined by the death of the grantee.[1]

CO. LIT. 41 b. Now it is to be understood, that if the lessee in that case [i. e., *pur auter vie*] dieth living *cestui que vie* (that is, he for whose life the lease was made), he that first entereth shall hold the land during that other man's life, and he that so entereth is within Littleton's words, viz. *tenant pur auter vie*, and shall be punished for waste as tenant *pur auter vie*, and subject to the payment of the rent reserved, and is in law called an *occupant* (*occupans*), because his title is by his first occupation. And so if tenant for his own life grant over his estate to another, if the grantee dieth there shall be an *occupant*. In like manner it is of an estate created by law: for if tenant by the curtesy or tenant in dower grant over his or her estate, and the grantee dieth, there shall be an *occupant*.[2] But against the king there shall be

[1] So, in case of an executor, *Buller* v. *Cheverton*, 2 Roll. Ab. 150, 151 (1628).

[2] In some books it is asserted, that there cannot be an occupant of estates created by law, without distinguishing between a *general* and a *special* occupant. Cro. Eliz. 58. 1 Bulstr. 135. 2 Ro. Rep. 123. Probably the assertion was meant to be confined

no *occupant*, because *nullum tempus occurrit regi*. And therefore no man shall gain the king's land by priority of entry. There can be no *occupant* of anything that lieth in grant,[1] and that cannot pass without deed, because every *occupant* must claim by a *que estate*, and aver the life of *cestui que vie*. It were good to prevent the uncertainty of the estate of the *occupant* to add these words (to have and to hold to him and his heirs during the life of *cestui que vie*) and this shall prevent the *occupant*, and yet the lessee may assign it to whom he will; or if he hath already an estate for another man's life without these words, then it were good for him to assign his estate to divers men and their heirs during the life of *cestui que vie*.[2]

BOWLES *v.* POORE.

King's Bench. 1611.

[*Reported Cro. Jac.* 282.

Avowry; for that one James Strangeways was seised in fee, and granted a rent-charge of twenty pounds a year to William Rabanks, to him and his heirs during his life, and the lives of Mary his wife and of Dorothy and Mary his daughters; and that William Rabanks died in the year 1596, Mary being his daughter, who married with the defendant Peter Poore in the year 1603; and because, at Michaelmas 1597, there was twenty pounds arrear, and not paid to the said Peter and Mary his wife, for the rent so arrear the said husband distrained, and avows.

The plaintiff pleaded the Statute of Usury; and found against him, and adjudged for the defendant.

to the former, for as to the latter the authorities seem decisive in favor of the heir's taking as special occupant if named in granting over curtesy or any other estate created by law. See 27 Ass. pl. 31. Plowd. 28, and 556, and Palm. 32. But even the doctrine against *general* occupancy of estates created by law comes merely from persons arguing as counsel, who neither explain why it should not be, nor cite any authorities except 15 E. 3. Fitzh. Abr. *Scire facias* pl. 17, which appears foreign to the purpose. — Harg. note.

[1] Lord Hale adds, *nor of a copyhold*. Hal. MSS. — See *acc.* 2 L. Raym. 1000, and the reason why in 6 Mod. 66. As to things lying in grant, Lord Coke in mentioning them must be understood to mean *general* occupancy only; for he writes in another place, that if *heirs* are named in the grant of a rent *pur auter vie*, they shall take, though formerly this was doubted. See *post*, 388. Dy. 186, ed. 1689, in marg. 1 Bulstr. 155. Mo. 625, 664, and Godb. 172. — Harg. note.

[2] When A. having a life estate (either for his own life or *pur auter vie*) grants it to B., a question may arise whether he intends to grant his whole interest or to make a grant only to B. for B.'s own life. See *Barron* v. *Barron*, Drury, temp. Nap., 384; *Brenan* v. *Boyne*, 16. Ir. Ch. 87; *Currin* v. *Doyle*, 3 L. R. Ir. 265; and note to St. 29 Car. II. *c.* 3, § 12, *post*, p. 39. — Ed.

A writ of error being brought, the first error assigned was, Because this rent granted to one and his heirs during his life and two others, is not descendible to the heir, nor shall the heir be occupant thereof. But All the Court held these limitations to be good enough; and that the heir shall have this rent as a party specially nominated, and as heir by descent, although it be not properly an estate descendible. *Vide* Lit. 168, 189; 19 Edw. 3, "Account," 36; Dyer, 233; and 16 Eliz. Dyer; 11 Hen. 4, pl. 2.[1]

SKELLITON *v.* HAY.

King's Bench. 1619.

[*Reported Cro. Jac.* 554.]

Ejectment. Upon a special verdict the case was, That the Bishop of Worcester made a lease to Sir William Whoorwood for the life of him and two of his sons; Sir William Whoorwood let the land to John Mallet at will, rendering rent, and after died; Mallet the lessee holds himself in, but mentions not how he claims, as occupant or otherwise: William Whoorwood (one of the sons of Sir William Whoorwood) being one of the *cestui que vie*, entered as occupant, and let it to the plaintiff; and the defendant, by the command of Mallet the lessee, ousted him.

The question was, Whether Mallet were the occupant, without claiming it as occupant? or, Whether the other may enter by occupancy?

It was adjudged for the defendant, that the lessee was occupant; for he being in possession, the law casts the freehold upon him, unless he waives it: and it is not requisite that he claim as occupant, unless there be a disclaimer in it; for being for his advantage, the law shall adjudge it in him as occupant. Wherefore it was adjudged for the defendant.[2]

St. 29 Car. II. *c.* 3, § 12 (1676). And for the amendment of the law in the particulars following; (2) be it further enacted by the authority aforesaid, That from henceforth any estate *pur auter vie* shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses;[3] (3) and if no such devise thereof be made,

[1] The rest of the case is omitted.

[2] See *Chamberlain* v. *Ewer*, 2 Bulst. 11.

[3] In *Doe* d. *Jeff* v. *Robinson*, 2 Man. & R. 249 (1828), A., seised of an estate to him and his heirs for the life of B., devised it to C., without using words of inheritance. *Held*, that C. took the estate for his own life only. But see Serjeant Manning's note to the case. *Hagarty* v. *Nally*, 13 Ir. C. L. 532, follows *Doe* d. *Jeff* v. *Robinson*; and

the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy as assets by descent, as in case of lands in fee simple; (4) and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.[1]

LOW *v.* BURRON.

CHANCERY. BEFORE LORD TALBOT, C. 1734.

[*Reported* 3 *P. Wms.* 262.]

THE bill was for an account of the rents and profits of divers messuages and lands in Warrington, in Lancashire, on this case; John Casson, seised of an estate for three lives in the premises, by his will dated the 12th of January, 1684, devised them to his daughter Mary Mollineux for life, remainder to her issue male, and for want of such, remainder to one Low, under whom the plaintiff claimed. Mary Mollineux, by lease and release conveyed the premises, in consideration of her marriage with Edward Burron, to the use of herself and her intended husband, and the heirs of their bodies, remainder to the heirs of her husband Burron. In 1705 Mary died without issue, and the plaintiff, claiming under the person in remainder, now brought this bill for an account of the rents and profits.

The questions were, *first*, One having an estate for three lives, and devising it to A., in tail, remainder to B., whether this remainder was good? 2*dly*, supposing it to be good, whether A. by such lease and release could bar it?

As to the first it was said, and so agreed by the court, that the limitation of an estate *pur autre vie* to A., and the heirs of his body, makes no estate-tail in A., for all estates-tail are estates of inheritance, to which dower is incident, and must be within the Statute *De Donis;* whereas in this kind of estate, which is in no inheritance, there can be no dower, neither is it within the Statute, but a descendible freehold only.

Also the Lord Chancellor held plainly, that this was a good remainder to B. on A.'s death without issue, it being no more than a description, who should take as special occupants during the lives of these three *cestui que vies.* As if the grantor had said, "instead of a

see note to *Barron* v. *Barron*, Drury, temp. Nap., 384, 393. Cf. cases cited in note, *ante*, p. 38, to Co. Lit. 41 b.

[1] This clause applies to incorporeal hereditaments. *Bearpark* v. *Hutchinson*, 7 Bing. 178 (1830).

See 14 Geo. II. *c.* 20, § 9, *post*, and 1 Vict. *c.* 26 (Wills Act) §§ 2, 3, 6.

wandering right of *general* occupancy, I do appoint, that after the death of A., the grantee, they who shall happen to be heirs of the body of A. shall be *special* occupants of the premises; and if there shall be no issue of the body of A., then B. and his heirs shall be the special occupants thereof." And that here can be no danger of a perpetuity; for all these estates will determine on the expiration of the three lives. So, if instead of three, there had been twenty lives, all spending at the same time. all the candles lighted up at once, it would have been good; for, in effect, it is only for one life (viz.), that which shall happen to be the survivor. For which reason, it were very improper to call this an estate-tail, since at that rate it would not be liable to a forfeiture, or punishable for waste, the contrary whereof is true.

2dly, the Lord Chancellor said, that though by a lease, or by a lease and release, A. might bar the heirs of his body, as in some respects claiming under him, yet he inclined to think A. could not bar the remainder over to B., who was in the nature of a purchaser, and would be no way subject to the encumbrances of A. any more than if the estate *pur autre vie* had been limited to A. for life, remainder to B. for life; in which case plainly A. could not bar B. especially by this conveyance of lease and release, which never transfers more than may lawfully pass; whereas the conveying away or barring the remainder limited to B. (admitting it to have been a good remainder) is doing a wrong to B. and depriving him of an estate, which was before lawfully vested in him. Nay, indeed. it seemed to him, as if no act which A. could do, would be capable of barring this limitation over to B. in regard there could be no common recovery suffered thereof, it being only an estate for lives; and his Lordship said, that this (as he remembered) was determined in the case of *Sir Hardolph Wasteneys* in the House of Lords, upon an appeal from this court.

. But notwithstanding all this, yet. it appearing that the right of the plaintiff, and of those under whom he claimed, had accrued so long since as the year 1705, now near thirty years ago, during all which time the defendant's possession had been unmolested, and the Statute of Limitations being pleaded, (though it was urged, that the plaintiff had not the lease in his possession, and that the defendant in his plea had set forth. that the lease had been renewed: and though it was moreover insisted, that however the plaintiff might be disabled from bringing an ejectment. he might yet bring a bill in equity;) the Lord Chancellor declared, he would grant no relief in the case of so stale a demand, and therefore allowed the plea.[1]

St. 14 Geo. II., *c.* 20. § 9 (1741). And whereas, by an Act made in the twenty-ninth year of King Charles the Second, intituled, *An Act for prevention of frauds and perjuries*, amongst other things, it is enacted, that estates *pur auter vie*, whereof no devise should be made,

[1] It is now settled that a *quasi* tenant in tail of an estate *pur auter vie* can bar remainders by a deed. See Fearne, C. R. 495 *et seq.*

should, in case there should be no special occupant thereof, go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and should be assets in their hands: and whereas doubts have arisen, where no devise has been made of such estates, to whom the surplus of such estates, after the debts of such deceased owners thereof are fully satisfied, shall belong; be it enacted by the authority aforesaid, that such estates *pur auter vie*, in case there be no special occupant thereof, of which no devise shall have been made according to the said Act for prevention of frauds and perjuries, or so much thereof as shall not have been so devised, shall go, be applied, and distributed, in the same manner as the personal estate of the testator or intestate.[1]

RIPLEY *v.* WATERWORTH.

CHANCERY. 1802.

[*Reported* 7 *Ves.* 425.][2]

IN a suit for the administration of the estate of the testator, William Marsh Mears, the Master reported that certain lands had been conveyed to the testator, his executors, administrators, and assigns, to hold for three lives and the life of the survivor and for a further term of twenty-one years. The Master certified his opinion that the testator had a chattel interest in these estates. Several exceptions were taken to the Master's report by the heir, of which the second was, that the Master ought to have certified that the testator had a real or descendible estate and interest of freehold in the lands aforesaid, and that the same belonged to, or descended upon, the heir at law.

The residuary legatees contended that these lands passed by the will (which was not attested by three witnesses), and were to be applied as directed by the will. In this they were opposed by the next of kin.

Mr. Mansfield and *Mr. R. Smith*, *Mr. Richards* and *Mr. Hollist*, the *Solicitor-General* and *Mr. Bell*, for different parties in support of the exceptions.

The *Attorney-General*, *Mr. Fonblanque*, and *Mr. Whishaw*, for the report.

THE LORD CHANCELLOR. [LORD ELDON.] As to the other question, it is singular, that it falls to me to decide it for the first time. It is impossible, that the exception can be right in stating, that it descended upon the heir. I always understood, that this was a freehold; though the word "descendible" has been inaptly applied to it; for though he is described as heir, he does not take as such, but as a special occupant named in the grant. An opinion of Mr. Booth, treating upon

[1] See 1 Vict. *c.* 26 (Wills Act) §§ 2, 3, 6.

[2] A short statement is substituted for that in the report, and only that part of the case which treats of estates *pur auter vie* is given.

what have been inaptly called entails and contingent remainders, notices the impropriety of that: every person named or described by the term "heirs," &c., being merely a special occupant: that description ascertaining the person to take, not by descent, but as named in the grant as special occupant. It was never doubted, that it was in a sense a freehold estate. It must be taken, either that the executor may be special occupant, or not. If the reasoning to prove, that he cannot, is sound, it follows, that a grant to A., his executors and administrators, must be construed, as if those latter words were not inserted. If so, it is directly within the Statute of Frauds and the other Statute together; for then there is no special occupant whatsoever; and the Statute of Frauds will directly attach; and it will go to the executor or administrator, because there is no special occupant; and at least is personal estate to the extent of being assets. In the case in Salkeld [*Oldham* v. *Pickering*, 2 Salk. 464; s. c. Carth. 376], the question arose in a court of law between the Statute of Frauds and the other Statute, whether the court would compel him to do more than to pay the debts. The decision, as far as it goes, is, that the court would not interfere farther. Yet I doubt, whether an executor or administrator ever takes anything as such, that he would not be bound to apply as personal estate of the testator. That doubt is founded upon this; that, when the last Statute passed, it did not recognize that case as well decided; treating it only as raising a doubt; reciting expressly, that doubts had arisen. It is clear, that after that Statute, if an executor or administrator is incapable of being a special occupant, they cannot hold for their own benefit any part of the personal estate taken under the Statutes. It is equally clear, that, as far as the party dies intestate, it is not by force of the will, but of the Statutes, that the distribution is to be among the next of kin; and unless the doubts recited by the Statute are ill founded, the consequence is clear, that the exception, as taken, cannot be allowed; for it would prove, that, if this had arisen before the last Statute, and the executor was incapable of being special occupant, it would have gone to the executor to the intent to pay the debts; and then the question would have arisen here, whether there was any trust for the heir. It would be very difficult to maintain that; and either the executor must have kept it himself, or it must have been laid hold of in a scramble. In the case in Peere Williams,[1] in the note, it is said, it is distributable in Chancery. That fortifies the doubt, that this court has always considered, that what an executor or administrator takes as such is clothed with a trust of that kind; and that confirms the proposition, that it is not to go to the heir. The Statute of Geo. II. orders a distribution, if this court would not: if it would, there are two authorities to take it from the heir.

An ulterior and different question is, whether if this is taken from the heir, it is to go as the personal estate undisposed, or with that which is disposed of; and not by the mere effect of the disposition, but by

[1] 2 P. Will. 282, note *a*.

the accumulated effect of the will and the Statute, or rather the Statute disposing to the same purpose of what is undevised as what is devised. It is not a great stretch, though hazardous, to say, the Statute meant to apply both to testacy and intestacy. The difficulty is, that both those cases must have been contemplated; for if the executor gets it by the Statute of Frauds, there must have been a will: if the administrator, in all probability an intestacy: and that Statute has both expressions. If the Legislature intended in all cases, either of intention to dispose, or not, to give it to the next of kin, they would probably not have used any other expression than "distributed:" not "shall go, be applied," &c. So "the personal estate of the testator" is a singular expression; for upon the construction now pressed it would have been sufficient to have said, "if the party dies intestate."

All I have said is upon the notion, that an executor cannot be a special occupant; which is a strong assertion now from the authority in Vaughan and the other considerable authorities; and Lord Hardwicke in *Westfaling* v. *Westfaling* [3 Atk. 460], treats him as capable of being so. It might be said, he is a species of special occupant; and the law in early periods might struggle against general occupancy to say, that by relation when appointed he should take from the general occupant; and considering, that the grant itself affects to give it to executors, there is not much favor due to the objection, that the executor as executor shall not take under the grant of the grantor.

But the question remains, if he does take as executor, has or has not this court considered him as taking for the benefit of those, who take the personal estate? In the case of intestacy the administrator does take for the benefit of those, who would in that case take it. Whether that reasoning will enable the court to say, that an executor, who will not be permitted in this court to take for his own benefit, shall apply it for the benefit of those, who gave him the character of executor, is new. I rather incline to hold it. The case of stock affords some analogy. Under all the Acts stock cannot be given by will except with two witnesses: yet this court often considers it given without witnesses; and for the purpose of a residuary bequest. Lord Thurlow has said, the executor takes it as executor; but takes it still under the will: yet it is expressly against the Statutes requiring expressly two witnesses. He reasoned it thus: that the will was a direction to the executor how to apply it; though it was not devised by that will.

July 26th. This case is involved in great difficulty of form, as well as turning upon one or two considerable questions. The Master's report does not answer the inquiry. The Master was only to state, what the interest was. The reference also ought to have been to state, what deeds, &c., were executed; and the court ought to have reserved to itself the question as to the right to the property. The Master has reported, that this property was a chattel interest.

The considerations are very different, whether it is a chattel interest, or a freehold interest in this court clothed with a trust for persons

claiming the personal estate. I do not wonder, that in framing the second exception, great difficulty was found, what expression to apply to this sort of property; for upon the cases I have found it very difficult to determine, under what phrase to describe this interest. If I had been aware of the importance of the point upon the second exception, I should have called in the assistance of the Master of the Rolls. The question seems to me to be new: What is to become of the property in a leasehold estate for lives, originally granted to a man, his executors, administrators, and assigns, beyond the point of the payment of the debts? I take it to be thoroughly settled, that a leasehold estate for lives, if of a freehold character, when so granted, is assets for the payment of simple-contract debts; and in this respect at least this freehold is distinguished from all other freeholds. But it has never been decided in *specie*, what is to become of such an interest, so granted, after the debts paid. The case in that respect is new; and the point difficult; for every judge has avoided a decision upon it.

I am clearly and decidedly of opinion, that the last proposition of this exception, that these estates belonged to, or descended upon, the heir at law, cannot be maintained. In every view of it, and subject to all the difficulties belonging to the question, my opinion is, that if the executor is not a trustee for the next of kin or those taking under testament the personal estate, he has himself a better right than the heir; and, without going through all the cases, it might be made out by unquestionable authority, upon a reason analogous to those given in the species of case, that I am about to mention. Where a tenant *pur auter vie* had made a lease for years, and the lessor died before the under-lease expired, the *cestui que vie* still living, the lessee for years would in that case take the estate itself; for to occupancy there are necessary a vacant possession, and a filling-up of it by some person, who meant to occupy; and no one could enter upon the lessee for years. Therefore if he chose to say, his lease should merge in the freehold, the estate would be full of him; and he would take it as his own. So the executor being in possession of the estate, and the estate full of him, it is impossible that he can be a trustee for the heir. The heir is therefore quite out of the case; and the question is between those claiming under the testament and the next of kin, and the executor, except as to the twenty-one years; which interest is clearly personal estate; and passes by the will.

This question upon the authorities is involved in great doubt and obscurity. First, without presuming to state, which of the authorities are most conclusive, there appears to be great countenance given in many books to the same sort of difficulty in making the heir a special occupant as in making the executor one; for if this is a descendible freehold, the heir takes by descent; and, that it is so in a sense, is excessively difficult to deny upon Vaughan's very learned and able argument, alluded to in all the books upon this subject, and particularly noticed in Mr. Hargrave's note. Vaughan's expression is very

like that in *Seymor's Case*, 10 Co. 95. Vaughan says, "The heir hath it not as a special occupant; for if so, such heir were an occupant; which he is not; for a special occupant must be an occupant; but he takes it as heir, not of a fee, but of a descendible freehold; and not by way of limitation, as a purchase, to the heir, but by descent," &c. He then cites Bracton, to prove, that an assize of *mort d'ancestor* might be maintained by the heir. Lord King seems also to think, that the question, as a question of assets, must be considered both with reference to taking as special occupant and in some other character.[1] Lord Coke in *Seymor's Case* says, he is special occupant but in a manner. In other books it is said, that he is not only special occupant, but he takes by descent. I do not quite understand this sort of language. But with this sort of language as to the title of the heir, it is a clear fact, that long previously to the Statute of Frauds the observation of the courts was thrown upon the effect of these grants of an estate to a man and his assigns, to a man, his executors, and assigns, or his executors, administrators, and assigns. That Statute upon reading it does not appear intended to apply to such grants. From the early cases the question seems to have arisen, whether these estates were devisable; and it was held, that they were not; though they had a descendible nature about them. Upon the Statute the observation is very proper, that if the executor was considered as special occupant, as the heir was, it is very singular, that there is no express provision as to estates so granted to executors. If previously the executor was considered as being the special occupant, or "in a manner" or "as it were" special occupant, this Statute has not said, what is to become of the estate, in case there is such a special occupant; but only, in case there is no special occupant; and then only declares, that it shall be assets in the hands of the executor, or administrator. It is necessary therefore to inquire, what was conceived upon this subject previously to the Statute; which is to be collected from the older books. The passages are referred in the more modern books. Most of them are in *Westfaling* v. *Westfaling;* and I have found Lord Hardwicke's judgment upon that case. *The Duke of Devon* v *Kinton*, first, before Lord Cowper (2 Vern. 719), and afterwards before Lord King,[1] was, according to the report in Vernon, a lease, in which originally the grant was to a man and his heirs, in the sense, in which those words are used as special occupant; but in Peere Williams it appears originally granted to trustees. The heir however might be in a sense represented as special occupant of the equitable interest. The counsel seem to have been taken to be clear, that, if permitted to go to the administrator without devise, it would be assets for payment of debts generally. The Lord Chancellor states, that it is made personal estate. The difficulty upon that is, What is the nature of the estate in the executor? Is it freehold? If so, how is it assets for simple-contract debts? If it is to be considered assets for simple-contract debts, as personal

[1] *Duke of Devon* v. *Atkins*, 2 P. Will. 380.

estate, and the effect of the Statute is to be laid out of the question, upon what principle is it personal estate to the extent of paying simple-contract debts, and no farther? It is difficult to know, how a principle of law can work that distinction; though a Statute might. But the Statute is laid out of the question; and upon the whole reasoning it is intimated, that it would be so, because it is personal estate. In what sense personal? Upon the executor's death who would take it? If he dies without an executor, would it go to the administrator *de bonis non?* Would it go to the representative of the executor? That is left in doubt. Would it be freehold estate in the man, who first got possession? That is left in doubt. But the clear opinion of Lord Cowper was, that, whatever was the nature of the interest, it was, independent of the Statute, assets for all creditors generally. It does not rest upon that authority only: that case coming afterwards before Lord King; and the account of Lord Cowper's opinion in the argument of Lord Talbot being, not only that the estate was assets, but that it was distributable. The difficulty upon this case is, that, when it is said, the premises are personal estate as naturally as if limited originally to executors, that involves as much difficulty as the question, What is to become of the estate, if granted originally to the executor? and all the doubts, that I before stated, occur upon that. What is to become of it, if the executor dies without a representative? Is the administrator *de bonis non* to have it: the executor of the executor, &c.? All that is left undetermined by the language of these cases.

The case of *Oldham* v. *Pickering*, in a great many books, was also a case long before the Statute of Geo. II., and therefore does not at all determine, what would have been the opinion of the court, if it had been subsequent to that Statute. That was an original lease to a man and his assigns *pur auter vie*. There was no assignment of it: therefore it is directly within the Statute. The judges were of opinion, the Statute made it assets for debts: but beyond that they left it just where it was. But it is to be observed, that is a case, to which none of the doctrine of this court, as applied to grants originally made to a man, his executors, administrators, and assigns, could be applied; for that is a case, in which the executor is treated as being a special occupant; and this court has considered him with reference to that, and also as being personal representative. It was their own by force of the Statute, not the grant; and therefore that had nothing to do with the question, if that grant had originally contained the word "executors." I am not surprised, that great difficulty occurred to them upon the point, what would become of it after the debts paid. It is not easy to determine that in case of the death of the executor. In Carthew, Lord Holt even doubts, whether it would not be assets for legacies; and if so, it is very difficult to say, it would not for the residue; which is in the nature of legacy. By the note in Peere Williams to *The Duke of Devon* v. *Atkins*, which note being in the first edition of that book is of some authority, it seems to have been

the opinion of the author of that note, that there was an equity to say, if the executor or administrator took it as a special occupant, the effect of his character as executor or administrator, should fix upon his legal title as such an equity for those, who claim the personal estate, to make him a trustee.

In *Westfaling* v. *Westfaling* it appears from Lord Hardwicke's notes, that several points were made. It was heard in May, 1746; and his Lordship took time till the 13th of April, 1747, to consider. *The Duke of Devon* v. *Kinton* was cited; and there is a reference "*Quod vide;*" which I understand as a hint to himself to refer to the original case. Great stress was laid upon that decision. The case was argued very fully; and it was insisted, that an estate *pur auter vie* to a man, his executors, administrators, and assigns, was assets for debts before the Statute. Lord Hardwicke says, there are four questions: two of law, and two of fact. First, as to the advowson, he held an advowson in gross to be assets by descent at common law for specialty debts, upon the authority of Co. Lit. 374 *b*, *Sir Thomas Jones*, *Robinson* v. *Tonge*, 3 Bro. P. C. 556; 3 P. Will. 398, before Lord King: in which the general question was referred by the Lords; and all the Judges agreed, that an advowson in fee-simple is assets in the hands of the heir for the debts of the ancestor. Secondly, as to the lease *pur auter vie;* he held such a lease to A. and his heirs, was within the Statute of Fraudulent Devises as to specialty creditors: plainly within the words and meaning; and he agreed with Lord Cowper, 2 Vern. 719: and he farther declared, that a lease *pur auter vie*, where there is no special occupant, though devised, is by the Statute of Frauds assets in the hands of the executor to pay debts generally; for that Statute in effect made him special occupant in all such leases, as if inserted therein. Lord Hardwicke then refers to 2 Roll. Ab. 151, and Lord Cowper's judgment in *The Duke of Devon* v. *Kinton*, and the reasoning of Lord Holt in *Oldham* v. *Pickering*, and in Carthew. In the case in Roll.'s Abr. it seems held, that an executor might be a special occupant; and a case immediately follows, in which it is said the executor shall not be a special occupant, because it is a freehold: which cannot descend to the executor. Lord Redesdale in an opinion I have seen says, great confusion has arisen upon that by not referring to a case in Dyer; from which it is collected, that the executor is treated clearly as having a freehold estate. But still, if a freehold, it is in contemplation of this court a freehold that has got into the executor; and the question is, whether he holds it as freehold for his own benefit in this court. If the executor is to be considered as special occupant, the Statute takes no notice of him as such. I do not know how to state the principle, that the executor is to be considered a special occupant, better than it is expressed in Bacon's Abridgment (2 Bac. Ab. 277); which has brought all the subject together; and which is very well filled up, as to the late cases, by Mr. Gwillim:

"If a lease be made of land to J. S., his executors and assigns,

during the life of B., the executors of J. S. shall be the special occupants, if he dies in the life of B.; for though it be a freehold, which in course of law would not go to executors, yet they may be designed by the particular words in the grant to take as occupants; and such designation will exclude the occupation of any other person; because the parties themselves, who originally had the possession, have filled it by this appointment."

And the reasoning is analogous to rents; of which, being an incorporeal hereditament, here could be no special occupant. Therefore if it was granted to A. during the life of B., by the death of B. there is an end of the grant: but if to the heirs, &c., then it is said, the executor should be *quasi* occupant: that is, he should take under the appointment and designation of the grantor, the person having a right to designate, who should take it.

Then, as to the Statute 14 Geo. II. we must look a little to the history of the law for the intention of it. First, suppose this sort of grant to A., his executors and administrators, during the life of another, not at all within the Statute of Frauds: if so, it should seem not to be within the Statute 14 Geo. II. If it is to be said in this sense to be within the former, in the words of Lord Hardwicke, "that, where it is granted without mentioning the executor, the effect of the Statute is to make it go to the executors and administrators, as if they were named," then you take this circumstance, that between the two Statutes the question had arisen, what was to become of such an estate under the effect of the Statute of Frauds; and the court was of opinion, the executor or administrator as such could keep it against an application in a court of law, notwithstanding any claim of the next of kin or under a will in the spiritual court. That opinion however was doubted. Lord Holt doubted, whether legatees should not take it; and very considerable doubt was entertained in this court upon the subject. The Statute was therefore made to exclude all doubts. First, take it, where the executors and administrators were not named: the doubt was, to whom it was to go after the debts. It seems, the Legislature would have left the matter very short of a rational and prudent purpose, if they had said simply, it should go among the next of kin. How is it to go among them, supposing, there was no other claim? If one dies, he took it as personal estate: does it become real estate afterwards? If more than one: is it to be divided; and each *aliquot* part to become freehold? Was it intended, that in all cases, where there was a will of personal estate generally, unless executed with three witnesses, it should not touch this interest: which as to the claim of the next of kin would be personal estate? I have a strong inclination, that the meaning was, that the residuum of such an estate should go with the rest of the personalty, where there was a will; and to the next of kin, where there was an intestacy; and that the language of that Statute would bear out that; and it would be more extraordinary, that persons claiming by bequest should not have been attended to,

when upon the Statute of Charles II. Lord Holt doubted as to legacies. The question is, whether, if the executor has the interest as in the nature of a freehold, he is not a trustee in equity for the persons taking the personal estate; and a will, not attested by three witnesses, will give them a title to call upon him for their benefit; he having the interest in him; and the interest not having passed from him. I think, that is the case in a court of equity; for I cannot think, how it should be, that such a property in an executor, independent of any Statute assets for simple-contract debts, from the fact, that it is in him as executor as well as special occupant, does not give that title; because it has in him the nature of personal estate. If so, I cannot state the principle for saying, it should be personal estate to the point of giving creditors a claim upon it, and no farther. The character of executor still remains in him. He is no less executor, because afterwards he is special occupant. If the character of executor raises a trust in him, and an interest in others, to that point of giving interest to all who can claim it as personal estate, it is personal estate. This was the opinion of Lord Cowper and of Mr. Peere Williams; and it would be a whimsical state of the law, that, considering it freehold, it should be in the power of the ordinary to dispose of it *ultra* the debts. To the heir it could not go, for the reasons I have stated. It must therefore remain with the creditor. The opinion of Lord Hardwicke also to a very considerable extent is in favor of this. All admit, it would be assets for debts; and in *Williams* v. *Jekyl*, Lord Hardwicke says, "The estate is a term for three lives, not created originally as a descendible freehold to go to the heir as special occupant, but to the lessee, her executors, administrators, and assigns; so that the executor of the first lessee must take this as a special occupant under the limitation" (2 Ves. 683).

Lord Hardwicke seems to consider it for that as personal estate. Lord Kenyon also seems to consider it personal. But if not, it must now be determined, what is to become of it. If he takes it beyond the debts as special occupant, then, if he should not have an executor, (for an administrator *de bonis non* is not sufficient under the original grant) would an administrator *durante minore ætate* take it? A second executor would be one taking it for his own benefit without any description of persons to take after his death. Then if he dies during the life, his case would fall directly within the terms of the Statute of Frauds; and it would be assets for his debts; and then under the Statute 14 Geo. II. would go to his next of kin. It would be very extraordinary, that, if such an estate was given to A., his executors, administrators, and assigns, and he should die, his executor paying the debts should hold it entirely for his own benefit; but, if that executor should die, his executor should take it under the two Statutes; and by the first Statute pay the debts, and by the other hand it over to the next of kin of the first executor.

There is very arduous difficulty in this. But I rather think, in

equity such a freehold estate, originally granted to A., his executors, administrators, and assigns, though devisable as to the legal interest only with three witnesses, has been considered as belonging to those, who take the personal estate, by an equity attaching upon the character of executor as executor, and there is extreme difficulty in saying, the administrator should take for his own benefit. It is the same as the case of stock; which is to be disposed of by will only with two witnesses: but Lord Thurlow said, where it is not so bequeathed, devolving upon the executor, it devolves upon him as executor, in trust for those, who are entitled to the personal estate. This is according to the idea of Lord Redesdale; and that is confirmed by a conversation I had with his Lordship, which produced a passage in the Legacy Act (Stat. 36 Geo. III. *c.* 52, § 20); for it was necessary to consider, how the duty was to be collected upon estates *pur auter vie;* where they happened to be personal estate; and a clause was introduced into the Statute, that they should be valued: the Legislature leaving, as they found it, how much was to be personal estate.

Upon this case therefore I am of opinion, that this interest can in no event go to the heir; that it does not belong to the administrator; and, as to the point between the next of kin and the residuary legatees, that the executor is in this court a trustee for those, to whom the testator has given the personal estate by a will sufficient to pass personal estate; and therefore he must be considered as holding it for the residuary legatees.

Declare that, with regard to the leases *pur auter vie*, the produce of those estates is in like manner to be considered the testator's personal estate. They remain freehold estates to the purchasers undoubtedly.[1]

[1] "And that which hath intricated men in this matter, hath been a conception taken up, as if the occupant had for his object in being occupant, the freehold which the tenant died seised of, which is a mistake; for the subject and object of the occupant are only such things which are capable of occupancy, not things which are not, and not the freehold at all, into which he neither doth, nor can enter; but the law casts it immediately upon him that hath made himself occupant of the land or other real thing whereof he is occupant, that there may be a tenant to the *præcipe*." — *Per* VAUGHAN, C. J., in *Holden* v. *Smallbroke*, Vaughan, 195 (1668).

"In the next place I shall agree, that the occupant of a house shall have the estovers, or way pertaining to such house, the occupant of the demesne of a manor, or of other land, shall have the advowson appendant, or villain regardant to the manor or common belonging to the land, and the services of the manor not severed from the demesne before the occupancy.

"For a possessor of a house, land, demesne of a manor, as occupant, doth not by such his possession sever anything belonging to the land, house, or demesne, more than the possessor by any other title than occupancy doth; and if they be not severed, it follows they must remain as before to the possessor of that to which they pertain." — *Id.*, 196.

"By this I hold it clear that if a man demise land to another, and his heirs, *habendum pur auter vie*, or grant a rent to a man and his heirs, *pur auter vie*, though the heir shall have this land or rent after the grantee's death, yet he hath it not as a special occupant (as the common expression is), for if so, such heir were an occupant, which he is not, for a special occupant must be an occupant; but he takes it as heir,

DOE d. LEWIS *v.* LEWIS.

EXCHEQUER. 1842.

[*Reported* 9 *M. & W.* 662.]

EJECTMENT. — The cause was tried before *Maule*, J., at the last assizes at Carmarthen, when a verdict was taken for the plaintiff by consent, with liberty to the defendant to move to enter a verdict or a nonsuit, according to the opinion of the court upon the facts of the case, which were as follows: William Lewis, the grandfather

not of a fee, but of a descendible freehold, and not by way of limitation, as a purchase, to the heir, but by descent; though some opinions are that the heir takes it by special limitation: as when an estate for life is made, the remainder to the right heirs of J. S., the heir takes it by special limitation, if there be an heir when the particular estate ends. But I see not how, when land or rent is granted to a man and his heirs, *pur auter vie*, the heir should take by special limitation after the grantee's death, when the whole estate was so in the first grantee, that he might assign it to whom he pleased; and so he who was intended to take by special limitation after the grantee's death, should take nothing at all.

"But to inherit as heir a descendible freehold, when the father or other ancestor had not disposed it, agrees with the ancient law, as appears by Bracton, which *obiter* in argument is denied in *Walsingham's Case*.

"'Si autem fiat donatio sic, ad vitam donatoris donatorio et hæredibus suis si donatorius præmoriatur hæredes ei succedent, tenendum ad vitam donatoris, et per assisam mortis antecessoris recuperabunt qui obiit ut de feodo.'

"Here it is evident that land granted to a man and his heirs for the life of the grantor, the grantee dying in the life of the grantor, the heirs of the grantee were to succeed him, and should recover by a writ of *mordanecester* in case of abatement (which infallibly proves the heir takes by descent) who died seised as of a fee, but not died seised in fee." — *Id.*, 201.

"I observe in this [*Williams* v. *Jekyl*, 2 Ves. Sr. 681] and some other cases, Lord Hardwicke seems to have thought that a lease for lives to one, his executors and administrators, would make the executor or administrator a special occupant. The old authorities seem the other way, and if the case were before me I should feel great difficulty in determining according to this apparent opinion of Lord Hardwicke. The title of an executor depends on his taking upon himself the administration of the will, and therefore does not commence *instanter*, but by his subsequent act; and as to an administrator, *ex necessitate*, his title cannot commence *instanter;* and therefore it should seem that the character of special occupant cannot properly belong to either.

"Two cases are stated in Rol. Abr. tit. Occupant, G. 2 and 3. The first is an anonymous case taken from Dyer 328, b. n. 10, but which is apparently reported in 3 Leon. 35, by the name of the *Lord Windsor's Case*. Rolle, in his Abridgment, certainly represents that case as having determined that if a lease be made of land to a man and his executors, *pur auter vie*, the executor shall be special occupant, although it be a freehold. On the contrary, Comyn, in his Digest, Estates, F. 1, tit. Occupant, states the case in Dyer as having decided that the executor shall *not* have the land as special occupant; for an occupant has the freehold, which an executor cannot take; and he refers to the second case stated in Rolle's Abridgment as an authority for this point. That case, which was long subsequent to *Lord Windsor's Case*, is certainly in conformity to the opinion of Comyn, and according to *Salter and Butler*, Moore, 664,

of the defendant, being possessed of a lease granted to him by one Nathaniel Morgan, to hold to him the said William Lewis, his heirs and assigns, for the lives of three persons named in the lease, one of

Cro. Eliz. 901, Yelv. 9; and the law seems to have been understood by Peere Williams, 3 P. W. 264, note D, as so settled, though Peere Williams does not appear satisfied with it. It is observable, too, that the Legislature, in framing the English Statute of Frauds, 29 Car. 2, *c.* 3, § 12, seems to have considered that there could be no special occupant to take on the death of a person holding *pur auter vie*, except his heir; and the Statute by its provisions did not convert an estate *pur auter vie*, which is in its nature freehold, into a chattel for want of a special occupant, though it gave the estate to an executor or administrator, nor did it authorize a devise of such an estate as a chattel. An executor or administrator, taking an estate *pur auter vie* by force of the Statute, is still tenant of the freehold, and the person against whom a *præcipe* must be brought, even in the case of an administrator *pendente lite*. The authority of Parliament could so vest a freehold; but could the mere convention of parties have the same effect? and could the convention of parties proceed further than the Legislature had done by the Statute of Frauds, and convert a freehold into a chattel interest, to be acted upon as a chattel interest, in *specie?* In *Oldham* v. *Pickering*, Carth. 376; 1 Salk. 464, and other books, it was held that an administrator taking an estate *pur auter vie* under the Statute of Frauds, took only for payment of debts, and debts being paid, held as special occupant by force of the Statute, and was not compellable to distribution. The English Act, 14 G. 2, *c.* 20, § 9, therefore made such an estate in the hands of an executor or administrator distributable as personal estate; though to be conveyed, I apprehend, by a freehold conveyance, for the Statute gives no other conveyance. I observe Mr. Hargrave, in his notes on Co. Lit. (41 b. n. 4) seems not to have been satisfied with *Westfaling* v. *Westfaling*, and the authority there relied on in Dyer, 328 b. But Lord Hardwicke appears, in deciding the case of *Williams* v. *Jekyl* and *Elliot* v. *Jekyl*, to have conceived that an executor, if not an administrator, might take lands granted for lives to one, his executors and administrators, as special occupant, independent of the Statute, and by virtue of the words of the grant; which he seems to have considered as making the estate a sort of chattel interest, different in its nature from a lease *pur auter vie* to a man and his heirs, expressly avoiding any declaration of what his opinion would have been on the case before him, if the lease had been of the latter description." — *Per* LORD REDESDALE, in *Campbell* v. *Sandys*, 1 Sch. & L. 281, 288–291 (1803).

"The general doctrine as to estates *pur auter vie* is plain enough. As to lands, if there is a lease to A. during the life of B., and A. dies living B., any person (at common law) who got possession of the land might hold it during the remainder of B.'s life as general occupant. But if the lease is to A. *and his heirs* during the life of B., then general occupancy is not permitted, and upon the death of A. the heir of A. would take. Now an heir, strictly speaking, can take by *descent* only an estate of *inheritance*, and it is, therefore, inaccurate to speak (though the expression is frequently used) of a descendible freehold not of inheritance. The heir in the case put takes not by *descent;* it is true he takes it because he fills the character of heir; but he takes not as heir by *descent*, but as *special occupant*.

"Then comes another question. Suppose a lease of land *pur auter vie* to A., his *executors and administrators*. Then this question has been raised: A. dies, leaving the *cestuis que vie* living; does A.'s *executor* take as special occupant, or may anybody take as general occupant? Upon this point there are authorities on both sides. One ground on which it has been contended that the executor cannot take is, that an executor takes only personal, not real estate. But I think that argument is founded on a misconception. When land is granted to A. and his executors, the executor does not take *as executor* by *descent* or devolution from his testator, but as the person described as *special occupant*. Another reason given is, that if there is a limitation to A. and his executors during the life of B., and A. dies living B., there must be some interval

whom was still living, by his will, dated the 25th of March, 1817, devised the premises in question to his son W. J. Lewis, and his assigns, during the residue of the lease, subject to the payment of the

before the title of the executor accrues, and that neither the executor nor administrator can take instantly. But I cannot see the force of that reasoning. If a man *devises* land to his executors, some interval must elapse before there is an executor completely constituted; but has it ever been held that such a devise cannot take effect? or has its validity been ever even doubted? However, that question is not necessary for me to decide here; but if it were, I should certainly hold that it is competent to an executor to take *land* as special occupant.

"Then another question has arisen: When the property is incorporeal, such as rent, tithes, &c., in that case can there be a special occupant? And there are *dicta* which tend to the conclusion that in such a case there cannot be a special occupant. But the effect of the authorities on the whole is in my opinion clearly this: that although as to incorporeal hereditaments there cannot be a general occupant, there is nothing to prevent special occupancy. There is no reason against it; and it seems unnecessary for any purpose of reasoning or principle to hold otherwise. And when you consider the reasoning on which it has been said that there can be no occupant, it is clear that that reasoning applies to *general*, not to *special* occupancy. The reason assigned is this: The occupant in his defence to a real action must either allege right in himself through his ancestor, which a general occupant, of course, cannot do; or else he must plead a *que estate*, that is, the estate of the person whose estate he has; and to show that, he must show the deed under which he claims, which the general occupant who has no documents of course cannot do. That is the sort of technical reasoning that has been applied. But it is clear that reasoning does not apply to a *special occupant*. He cannot plead, it is true, that he is in of his ancestor's estate, but he can plead in the *que estate;* he can plead his deed, and therefore if it were necessary to decide it, there would be no doubt on my mind that there may be a *special occupant* of an *incorporeal hereditament*. And concluding, as I do, that the law is, that an executor may be special occupant of a *corporeal* hereditament, I should have no hesitation in coming to the conclusion that he may also be special occupant of an *incorporeal* hereditament." — *Per* KINDERSLEY, V. C., in *Northen* v. *Carnegie*, 4 Drew. 587, 590–592 (1859). See the Vice-Chancellor's remarks given at greater length in the report in 28 L. J. Ch. 930, 933–936. Cf. Challis, Real Prop. 289, 290.

"Instead of limiting the estate to the trustee and his *heirs*, it was sometimes limited to him, his *executors and administrators*, it being understood that executors or administrators may take as special occupants. Lord Hardwicke always treated this point as clear; *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. 61; *Williams* v. *Jekyl*, 2 Ves. 681; *Westfaling* v. *Westfaling*, 3 Atk. 460; 7 Ves. 446, cited from Lord Hardwicke's notes; and Lord Eldon expressed the same opinion; see *Ripley* v. *Waterworth*, 7 Ves. 425. But in the case of *Campbell* v. *Sandys*, 1 Sch. & Lef. 281, Lord Redesdale said that the old authorities seemed the other way, and if the case were before him, he should feel great difficulty in determining according to the apparent opinion of Lord Hardwicke. Lord Redesdale, in support of his opinion, referred to two cases stated in 2 Ro. Abr. tit. Occupant (G) 2 and 3; the first of which is reported in Dyer, 328 b, pl. 10, and in Leonard's third volume, p. 35, by the name of *Lord Windsor's Case*, and is stated by Rolle as a determination, that if a lease be made of land to a man and his executors *pur autre vie*, the executor shall be special occupant, although it be a freehold. He also referred to Comyn's Digest, Estates (F 1) tit. Occupant, where the case in Dyer is stated as a decision, that the executor shall not have the land as special occupant, for an occupant has the freehold, which an executor cannot take; and Comyn also refers to the second case stated by Rolle, as an authority for this point. 'That case,' Lord Redesdale added, 'which was long subsequent to the case in Dyer, is certainly in conformity to the opinion of Comyn; and according to *Salter* v. *Butler*, Moore, 664, Cro. Eliz. 901, Yelv. 9; and the law seems

rent and the performance of the covenants. W. J. Lewis, the son, having died intestate in possession of the premises, the defendant took possession of them as his nephew and heir-at-law. This ejectment was brought by the administratrix of W. J. Lewis, and the question was whether the leasehold premises belonged to the personal representative or to the heir.

to have been understood by Peere Williams, 3 P. W. 264, note [D] as so settled, though Peere Williams does not appear satisfied with it.'

"Now it is too much to say, that no point is in practice considered more clear than that an executor or administrator may take a freehold estate as special occupant. The contrary opinion seems to have arisen from the case of a corporeal hereditament, of which there may be an occupancy, and the case of an incorporeal hereditament, as a rent, of which there cannot be any occupancy, having been confounded. Rolle seems to have drawn a just conclusion from the case in Dyer and Leonard. It appears to have been taken for granted in that case, that an executor might be a special occupant, but there the tenant *pur autre vie* had made a lease; and the question was, whether the *lessee* should not be occupant. In the next case stated by Rolle, the determination was, that of a freehold *rent* the executor could not be special occupant. C. B. Comyn without doubt confounded these cases; for, in support of his position, that an executor cannot take a freehold as special occupant, he refers at once to the case in Dyer, and the last case in Rolle, whereas that case turned upon a corporeal, this upon an incorporeal hereditament; no two cases can be more distinct. The reason stated by Comyn, 'that an occupant has the freehold, which an executor cannot take,' is copied from Rolle's last case; but there the reason is, 'because that *that* [viz. the *rent*] is a freehold which cannot descend to the executor,' and not that a freehold generally may not be taken by an executor as special occupant. The case of *Salter* v. *Butler*, which is referred to by Comyn and by Lord Redesdale, was also the case of a rent, and there the claim was by an administrator, and the rent was granted to the intestate, his executors and assigns, so that he could not claim as an occupant, because the interest was not capable of occupancy, not by the grant, because he was not an assignee. As to Peere Williams, he simply refers to the second case in Rolle, to show that an executor cannot be a special occupant of a rent, although he seems to think that upon principle, an executor might be a special occupant of even a rent as well as an heir; so that if his opinion should be thought to bear upon the point, it is in favor of the executor's ability to take as special occupant. See 3 Jo. & Lat. 169.

"C. B. Gilbert has taken the precise distinctions on this head, for which he refers to Rolle's Abridgment and the case in Dyer. That learned writer lays it down as clear, that an executor may take a freehold as special occupant; for though it be a freehold, which in course of law would not go to executors, yet they may be designed by the particular words in the grant to take as occupants; and such designation will exclude the occupation of any other person, because the parties themselves, who originally had the possession, have filled it up by this appointment. But, he adds, that if a *rent* be granted to J. S. and his executors, during the life of B., by the death of J. S. the rent is determined, because the executors cannot take as special occupants, since the nature of the thing lying in agreement is not capable of occupation; nor can they take by the grant, because then they must take as representatives, which they cannot be of a freehold; and the law will not permit people at their pleasure to vary the course of descent. Bac. Abr. tit. Estate for life, § 3; and see *Savery* v. *Dyer*, Ambl. 140. In the case of *Northen* v. *Carnegie*, 4 Drew. 587, Kindersley, V.C., expressed his opinion that an executor may be *special* occupant of an *incorporeal* hereditament; but the authorities were not fully considered." — *Sugd. Pow.* (8th ed.), 193–195.

Where land was conveyed *pur auter vie* to A., his heirs, executors, administrators, and assigns, it was *held*, in *Atkinson* v. *Baker*, 4 T. R. 229 (1791), that the heir took as special occupant; and in *Carpenter* v. *Dunsmure*, 3 E. & B. 918 (1854), the same was held in the case of a devise.

John Wilson now moved accordingly.

Parke, B. It has been said that much doubt exists in the profession as to the question which has been raised in this case; but I do not see why such doubt should have existed. Originally there was a special occupant designated in the lease to William Lewis, the grandfather, his heirs and assigns; but when the grandfather devised the premises to W. J. Lewis, the son, and his assigns, he thereby defeated the title of his heirs as special occupants, and the devisee continued to hold the property to himself and his assigns for the residue of the term. The utmost that could be said is, that if W. J. Lewis the son had made an assignment of the lease, perhaps his assignee would be entitled to hold the estate as special occupant; but where, as is the case here, he makes no assignment at all, it falls within the express words of the Statute of Frauds, 29 Car. 2, *c.* 3, § 12, which provides that, in case there shall be no special occupant of an estate held *pur autre vie*, it shall go to the executors or administrators of the party that had the estate thereof. Now here there is no special occupant, the title of the first lessee having been put an end to by the will; the land has been held under a tenancy *pur autre vie* to W. J. Lewis the son, and his assigns; and as he died without creating any assigns, the property goes to his personal representative. It is said, however, that although there was here no express assignment by W. J. Lewis the son, the property may go to his heir, as being the assign in law; but it must be remembered that this is a devise under the Statute 29 Car. 2, *c.* 3, not under the Statute of Wills, relating to an estate in fee-simple; and I do not think that "assigns" can be considered as comprised under the words "heirs, executors, or administrators," used in that Statute. The word "assign" does not mean "heir;" it means a person substituted for another by an act of some kind or other; and as the devisee has not done any act to appoint any assign, the property must go to his administratrix.

Alderson, B., and Rolfe, B., concurred.

Rule refused.

WALL *v.* BYRNE.

Irish Chancery. 1845.

[*Reported* 2 *J. & L.* 118.]

Luke Wall, being entitled to the lessee's interest in certain lands, held under a lease for lives renewable forever, in 1831 obtained a renewal thereof; and thereby Robert Johnston, in whom the reversion was then vested, demised the lands to him, his heirs and assigns, for the term of three lives therein named, with a covenant for perpetual renewal.

In September, 1832, Luke Wall made his will, containing the following devise, which included in it his interest in the lease: "And as for and concerning all my real, freehold, and personal property, which I now possess or am entitled to, I give, devise and bequeath the same and every part thereof unto my dear wife and my children, Margaret, Anne, Ellen, Mary, Joseph, Luke, Christopher, and Valentine, share and share alike:" and died shortly afterwards.

Mary Wall and Christopher Wall, having survived the testator, died intestate and unmarried.

This suit was instituted to administer the assets of Luke Wall, and to carry the trusts of his will into execution: and under the decree to account pronounced in it, the Master reported that the shares of Mary Wall and Christopher Wall in the lands demised by the lease of 1831, descended upon and were vested in Joseph Wall, their eldest brother and heir-at-law.

To this report exceptions were taken upon behalf of some of the younger children of the testator, upon the ground that the Master should have found that, upon the death of Mary Wall, her share in the freehold estates, which were estates *pur auter vie*, and devised by the testator to his wife and children share and share alike, without naming any special occupants, vested in her personal representatives. A similar exception was taken to the finding of the Master with respect to Christopher Wall's share.

Mr. Fitzgibbon and *Mr. Connor*, in support of the exception, cited *Doe d. Lewis* v. *Lewis*, 9 M. & W. 662, and were proceeding to argue the case, when they were stopped by

The Lord Chancellor. [Sir Edward Burtenshaw Sugden.] I cannot permit this exception to be argued. If ever a point was closed by decision it is this; that where a man has an estate *pur auter vie*, limited to him and his heirs, and devises that estate, by words which, without words of limitation, would pass the *quasi* inheritance — as the words here would — and the devisee dies intestate, the persons to take are the heirs and not the personal representatives of the devisee. The point was so decided in this country many years since;[1] and that decision has been followed in England; and many opinions have been given on it. I must therefore decline to hear the question argued; for I will not be auxiliary to unsettle settled opinions. The case of *Doe d. Lewis* v. *Lewis* is distinguishable. There the devise was to a man and *his assigns*, which, it was held, did not mean *heirs:* but in this case the devise is in general terms, and in words which are sufficient to pass the entire interest under the lease. If this had been a fee simple estate, it would have gone to the devisee and his heirs under the terms of this devise. The testator gives all his interest in the lands to his devisees; and both law and good sense require that they should take the same interest which he himself had. It is a settled point, and not now open to

[1] See *Blake* v. *Jones* d. *Blake*, 1. Hud. & Bro. 227 n.; *Philpotts* v. *James*, 3 Doug. 425. — Rep.

be disturbed. It was settled by a case in this country, decided upon great consideration, which has been since recognized and acted on. I shall therefore follow those authorities, and leave the error, if it be one, to be corrected elsewhere.[1]

[1] In *Philpotts* d. *Philpotts* v. *James*, 3 Doug. 425 (1784), A., seised of an estate *pur auter vie* to him and his heirs, devised it to B (without more). B. died without leaving a valid will. Lord Mansfield and the Court of King's Bench were of opinion that B.'s heir, and not his personal representative, was entitled. B.'s heir was, however, also the heir of A., and the case may perhaps rest on the ground that B. took an interest for his own life only. See opinion of *Buller*, J., and also note to St. 29 Car. II. *c.* 3, § 12, p. 39, *ante*.

"It has often occurred to me in practice, says Sir W. D. Evans, to meet with a case where the estate was demised to the lessee, his heirs and assigns; and the lessee had devised it in general terms, without mentioning executors or heirs; and, after the death of the assignee, it has been a question how it should go. I have seen opposite opinions on the subject by Lord Kenyon and Mr. Fearne: the latter in favor of the heir; the former in favor of the executor, which opinion was persisted in after a communication of the opposite sentiments of Mr. Fearne. And it is no doubt the true conclusion upon the subject: for, as there is no actual designation of the person of the heir, the ground on which he could claim, as special occupant, entirely fails; and the case, therefore, reverts to the general disposition of the Statute of Frauds, that where there is no special occupant, it shall go to the executor." — *Chambers, Landlord and Tenant*, 563.

In *Doe* d. *Kerr* v. *Cassidy*, 1 Huds. & B. 222, note (1807), and *Jack* d. *Alexander* v. *Jamieson*, Id. 225, note (1811), the Court of King's Bench in Ireland decided in favor of the executor. In the first case Downes, C. J., said, "I wished to have this case spread on the record, not from any doubt of my own, but an alleged difference of opinion among respected individuals at the bar." In the second case he said, "The same point, precisely, was decided in the case of *The Lessee of Kerr* v. *Cassidy*, and no reason has been shown why we should change our opinion. We regret that we have allowed this to be argued, which we would not have done, had we been at first aware, that the point was the same as in the former case."

But in *Blake* v. *Jones*, 1 Huds. & B. 227, note (1813), the Court of Exchequer Chamber in Ireland, affirming the judgment of the Court of Common Pleas, held for the heir.

But see *Croker* v. *Brady*, 4 L. R. Ir. 61, 653.

CHAPTER IV.

GIFTS MORTIS CAUSA.

DRURY *v.* SMITH.

CHANCERY. 1718.

[*Reported* 1 *P. Wms.* 404.]

A. HAD a nephew, and being about making his will, directed the scrivener employed by him for that purpose to give £100 to his nephew; afterwards the testator, recollecting that his nephew had £100 of his in his hands, therefore ordered the scrivener not to put the legacy into his will, in regard his nephew had already that £100 in his own hands, and the testator made B. (that was his niece) executrix and residuary legatee.

Afterwards the nephew came, and brought a specie bill for this £100 to the testator, who, in his last sickness, gave the said £100 bill to be delivered over to his nephew, in case he [the testator] should die of that sickness, which did accordingly happen.

And now, on the nephew's bringing a bill against the executrix, for this £100 note, it was objected, that this being a parol gift, and contrary to the will by which the executrix was made residuary legatee, it would introduce all the inconvenience of perjury which the Statute of Frauds intended to prevent, if such evidence, or verbal dispositions, should prevail against the will, and would be contrary to the words of the Statute, which say, a will in writing shall not be revoked by parol.

LORD CHANCELLOR. [LORD COWPER.] The case is not so strong as if this very £100 note had been specifically devised; for devising the *residuum* is only the rest of his estate, that he should not, by will or otherwise, dispose of; but this is a gift in the testator's life-time, *donatio causa mortis*, and the possession transmuted, and certainly, notwithstanding the will, the testator had a power to give away any part of his estate in his life-time; he might in his life-time, after the making of his will, give away any part of his estate *absolutely*, and by the same reason might, notwithstanding the will, give away any part thereof *conditionally*; and this gift being so fully proved:

Decree the plaintiff his £100 bill with costs.

LAWSON *v.* LAWSON.

CHANCERY. 1718.

[*Reported* 1 *P. Wms.* 441.]

THE testator being languishing upon his death-bed, delivered to his wife a purse of gold containing about 100 guineas, and bid her *apply it to no other use but her own*, and likewise drew a bill upon a goldsmith to pay £100 to his wife, *to buy her mourning* and to maintain her until her life-rent (meaning her jointure) should become due, and soon afterwards (viz., about seventeen days after the drawing of the bill) the testator died.

This coming on upon the Master's report, the MASTER OF THE ROLLS [SIR JOSEPH JEKYLL] was clearly of opinion, that as to the purse of gold, it was *donatio causa mortis*, in regard the testator was then languishing upon his death-bed; and therefore, it being in nature of a legacy, and not to take effect but in case of the donor's death, under such circumstances a man might give to his wife; and it was the stronger, it being said that she was to apply it to no other use but her own; for consequently she was not to apply it to her husband's use.

His Honor further observed, that this being *donatio causa mortis*, need not be proved with the testator's will, neither need any such gift, though in nature of a legacy, be so proved; for they operate as a declaration of trust upon the executor.

As to the other point, the court at first held, that the testator's ordering the goldsmith to pay £100 to his wife was but an authority, and determined by the testator's death.

To which *Mr. Vernon* replied, that this was an authority coupled with an interest, and being given for mourning, it could not take effect but upon the testator's death, and therefore his death could not be a revocation; which seemed to have weight; but His Honor doubted whether there could be a *donatio causa mortis* without an actual delivery to such donee; at least, it was a point not settled, for which reason, he would (he said) reserve it for further consideration.

Afterwards in Hilary Vacation, 1718, the MASTER OF THE ROLLS delivered his opinion solemnly on both these points: —

That the delivery of the purse was good; and must operate as a *donatio causa mortis, ut res magis valeat, &c.* Because otherwise one could not give to his own wife, and there being a delivery by the testator in his last sickness, and when he was so near his end, and the bidding his wife apply it to no other use than her own, made this part of the case plain; and he cited Swinburne, 18, where it appears there are three sorts of gifts *causa mortis*, and said this was in the nature of a legacy to the wife.

Secondly, as to the bill of £100 drawn upon his goldsmith, payable to his wife to buy her mourning and to maintain her until her life-rent (viz. jointure) should come in : —

This His Honor held good, and to operate as an appointment; that if the wife had received it during the husband's life-time it would have been liable to some dispute, but that he apprehended this amounted to a direction to his executors that the £100 should be appropriated to his wife's use. And he inclined to think, that even if the wife had received it in the husband's life-time, she should have kept it; that being for mourning, it might operate like a direction given by the testator touching his funeral, which ought to be observed, though not in the will; that the court ought to go as far as it could to assist the meaning of the party in this case; here was a wife attending her husband in his last sickness, and the husband, sensible of her affections, was conferring gifts upon her, and those not extravagant (for then he admitted equity ought not to make them good), but the gifts were but £200, whereas the personal estate amounted to £8,000, so that this was only an instance of the tender care of an affectionate husband towards his wife; wherefore it was decreed accordingly.

MILLER *v.* MILLER.

CHANCERY. 1735.

[*Reported* 3 *P. Wms.* 356.]

ONE having a wife and a son that was his only child, two days before his death made his will, giving thereby to his wife £150 per annum, in long exchequer annuities, during her widowhood. After which the same day he made a codicil, by which he gave to his said wife a further exchequer annuity and £600 in money, to be paid her immediately after his death. Subsequent to this, and about an hour before his death, the testator having called to his servant to reach him his pocket-book, took thereout two bank notes for £300 each, and another note for £100 (not being a cash note, or payable to bearer) all which notes he ordered his servant to deliver to his wife (then present) adding, that he had not done enough for her. But the wife for some time declined taking these, having, as she said, enough already, and for that it would injure their son, who was the residuary legatee in the will. Nevertheless, at length she was prevailed on by her husband to accept of the two bank notes, and also the other note. After which the testator by word of mouth gave her his coach and a pair of his coach-horses, bidding three witnesses then present take notice of it, and that he was in his senses, who accordingly made a memorandum thereof in writing.

On a bill brought in the name of the infant son by his *prochein amy*, against the widow and the executors, for an account of the testator's

personal estate, it was insisted on behalf of the plaintiff, that since by the codicil a legacy of £600 was given to the wife, payable immediately after the testator's death, the delivery of these two bank notes amounting to just the sum of £600 was a payment of such legacy in the testator's life-time; and with regard to the other note for £100 which was not payable to bearer, that was merely a *chose en action*, and consequently could not pass by a delivery thereof. Also as to the coach and horses, these were not delivered in the testator's life-time, for which reason the widow could have no claim to them.

Master of the Rolls. [Hon. John Verney.] The gift of the £600 contained in the bank notes was a *donatio causa mortis*, which operates as such though made to a wife, for it is in nature of a legacy, but need not be proved in the spiritual court as part of the testator's will. Neither are gifts of this kind good, unless made by the party in his last sickness. And though in the principal case the sum be the same with the £600 money legacy given by the codicil, yet the manner of giving these notes, together with the expressions then made use of by the husband, declaring that he had not sufficiently provided for his wife, manifestly show them to have been designed as additional. On the other hand, the wife by declining at first to accept of them, appears to have been no craving woman.

But then as to the note for £100 which was merely a *chose en action*, and must still be sued in the name of the executors, that cannot take effect as a *donatio causa mortis*, inasmuch as no property therein could pass by the delivery, much less can the widow be entitled to the coach and horses, of which there was no delivery in the testator's life-time.

SNELGRAVE *v.* BAYLY.

Chancery. 1744.

[*Reported Ridg. temp. Hard.* 202.]

The question in this case was whether a bond or other *chose in action* may be granted by way of *donatio mortis causa.*

Lord Chancellor. [Lord Hardwicke.] I had some doubt whether there could be a *donatio mortis causa* of a bond or other *chose in action*, because a bond considered at law as a thing in possession, is no more than the wax and paper, and no more can pass at law by the gift of such bond; but the beneficial property or interest is the debt which at law still remains in the power of the donor, notwithstanding his gift of it to another: but equity has introduced great alteration in *choses in action*, and continually supports the assignments of them in such manner, that, if an obligee assigns a bond, and the obligor has notice of it; yet if he after such notice will pay the money to the obligee, though at law it is a good payment, and the obligee can well release it,

yet in equity the obligor shall be obliged to pay the money over again to the assignee; so, if a bond is lost at law, the debt is lost, because the obligee cannot sue at all; for though the loss of such bond may be given in evidence upon the trial well enough, yet the plaintiff will be wrecked before he has advanced to a trial: for upon his declaring, he must make a *profert* of the bond, and give *oyer* of it, which it is impossible for him to do, when his bond is lost. But in equity, though the bond is lost, yet the demand contained in it is not, for he may recover the money in this court; therefore I am now satisfied, that this is a good *donatio mortis causa* of the bond, and it is the stronger by reason of the extent to which this court has gone in supporting assignments of *choses in action*: — the testator might have assigned this bond, and though he had done it voluntarily, this court would have maintained it against himself, or any person claiming under him; therefore this court supports equitable interests in the same manner as if they were in possession. The testator gave this bond to the defendant in his sickness, with all the circumstances and expressions to make it a valid gift, *mortis causa*, here, says he, take this bond, it is yours; if I die, I give it to you, that you may have something after my death. This is read out of the donee's own answer, and is clear proof and stands uncontrovertible.

Suppose the testator in the present case had bought chattels and taken them in a bill of sale in a trustee's name, so that he would have had only an equitable interest, the legal property being in the trustees; suppose the *cestui que trust* had had possession of the goods, and on his death-bed had delivered them over to the defendant in such manner as he has done the bond: this would have been a good *donatio causa mortis*, and yet there he had no more than an equitable interest, and no legal one; and such gift would bind the equitable interest as much as it would the legal property, if the party had had it.

The two cases or authorities are strong as to this purpose, that in 1 Wms. 441, is in point: there the testator intended to give £100 to his wife, and drew a note on his goldsmith for that sum, payable to his wife; the note vested in the husband, and was the same as if it had been to have been paid to the husband himself, and the demand upon the goldsmith was a *chose in action* in the husband himself; and yet a *donatio mortis causa* of such note was decreed to be valid; and that does not at all differ from the case of a bond.

The other case in Chancery Precedents, 300, as to the opinion given at the Rolls, is equally strong with the former. There the testator gave to A. a hair-trunk with all that was in it; there happened to be a tally on the Government, enclosed for £500, which was a *chose in action*. The trunk itself was no more than the *res continens* of no value; the Master of the Rolls decreed it as a *donatio mortis causa*; upon appeal, the Chancellor was of another opinion, but upon another foundation; not that the *donatio mortis causa* was not good, but that a subsequent will was a constructive satisfaction of it, and that both gifts

should not stand. I don't say, that this was a direct opinion on this question; yet it does not contradict, I think, the present case, being like the cases of equitable assignments of *choses in action* it must

Dismiss the bill without costs.

WARD *v.* TURNER.

CHANCERY. 1752.

[*Reported* 1 *Dick.* 170.]

THE plaintiff, as representative of John Mosely, brought his bill to have a transfer of £600 new South Sea annuities, and several specific parts of the personal estate of William Fly, delivered to him; and to have an account of what was due to Mosely for services done to Fly.

It appeared, that Fly in his life-time had expressed great kindness for the plaintiff's testator; and in the presence of one Mounsey, a witness, had taken three transfer receipts for £600 South Sea annuities, and declared he would give them to the plaintiff's testator; and in the presence of one Greentree, another witness, taking the key of his scrutore, took out three papers, and said, "Here, Mosely, I give you these three papers: these are for South Sea stock, and will serve you when I am dead;" and in the presence of one Taylor declared, he gave the plaintiff's testator all the goods and plate in his house, save his sword, gun, and books.

LORD HARDWICKE, C. Suppose the facts above sworn to were well proved, what is the law arising on these facts?

First, as to any part of the things given, except the £600 South Sea annuities, I am of opinion the gift is not good, there being no pretence of any delivery, and it is too general. If they prove anything, they must prove a nuncupative will.

Then for argument's sake, take the gift of the £600 South Sea annuities, as an independent donation; the question is, whether it be such a gift as the law of England will allow as a *donatio causa mortis*. And first, the fact of the gift is proved only by Greentree, whereas the civil law requires five witnesses, and limits it in point of value. *Vide* Justinian's Institutes. The express gift sworn by Greentree is of the three receipts only, which the plaintiff would construe as a gift of the South Sea annuities.

The question that arises is: whether the delivery of the thing, given by way of *donatio causa mortis*, is necessary; and if necessary, if this delivery of the three receipts is a sufficient delivery. I am of opinion a delivery is necessary, and that the delivery of the three receipts is not sufficient to validate this act.

In the Roman law there are three kinds of *donatio mortis causa*. First, where the property in the thing doth not vest, until the death of the donor; second, where the property immediately passes, but is defeasible, in case the donor recovers; third, where the donor moved with present danger, doth not think it so immediate as to give the party a vested interest in them, but only to take effect, when the donor dies.

Now, as to the second, the civil law requires a delivery; but as to the first and third, not an absolute delivery, because the property doth not completely pass till the death of the donor.

But the civil law is not binding in this country, farther than it hath been received, and allowed here, and that must be determined by authorities; and the result of the authorities is, that the civil law hath been received in England, only so far as the gift hath been attended with delivery. *Swinburne*, part 1st, § 6; *Drury* v. *Smith*, 1 P. Wms. 404; *Lawson* v. *Lawson*, Ibid. 441; *Jones* v. *Selby*, Precedents in Chan. 300; *Hedges* v. *Hedges*, Ibid. 269; *Snellgrove* v. *Bailey*, March, 1744, 3 Atk. 214; *Miller* v. *Miller*, 3 P. Wms. 356.

Then I come to the question, whether the delivery of the three receipts is a delivery of the thing; I am of opinion it is not, and find no authority for it; the delivery of the thing given, is what is relied on in all the cases; the only case where a symbol was held good, was in *Jones* v. *Selby*; the key of the trunk wherein the thing was kept (Exchequer Tallies), but I am of opinion that amounted to a possession in the donee of the tallies, for the donor was restrained from making use of them, without the consent of the donee, and the donor could not rightfully come at them, without the key.

I think in like manner, as to a key of a warehouse for goods, or of a wine cellar.[1]

But as to the delivery of the receipts for the stock, it amounts to nothing; they being of no use after the acceptance of the stock, and are seldom kept.

Suppose a mortgage and a separate receipt taken for the consideration money, and the receipt is delivered over, it could not be a delivery of possession.

Upon the whole I am of opinion this gift is not valid, without a transfer, or something that amounts to a transfer, and it being unaccompanied with a delivery, is merely legatory, and amounts to a nuncupative will, and allowing it would be a breach of the Statute of Frauds. Therefore let the bill be dismissed as to the gifts claimed.[2]

[1] On delivery of a key as delivery of the contents of a trunk or desk, see *Hatch* v. *Atkinson*, 56 Me. 324 (1868); *Stephenson* v. *King*, 81 Ky. 425 (1883).

[2] Lord Hardwicke's opinion is given more at length, 2 Ves. Sr. 431; the following is an extract from it (pp. 442–444): —

"It is argued, that though some delivery is necessary, yet delivery of the thing is not necessary; but delivery of anything by way of symbol is sufficient: but I cannot agree to that; nor do I find any authority for that in the civil law, which required

TATE *v.* HILBERT.

CHANCERY. 1793.

[*Reported* 2 *Ves. Jr.* 111.]

THE plaintiffs in these causes were relations of Mark Bell: Jane his niece; and Mary his great niece. The object of the first bill was to have a banker's cheque for £200 paid, either out of £800 cash belonging to Mark Bell in his banker's hands at the time of his decease, and admitted by the defendant, the executor, to have been possessed by him, or out of his general assets. The cheque was in this form: — "Pay to self or bearer £200. MARK BELL."

The other bill was to have payment of a promissory note, for £1000 to the plaintiff Jane, signed by Mark Bell. These claims were made

delivery to some gifts, or in the law of England, which required delivery throughout. Where the civil law requires it, they require actual tradition, delivery over of the thing. So in all the cases in this court delivery of the thing given is relied on, and not in name of the thing, as in the delivery of sixpence in *Shargold* v. *Shargold*. If it was allowed any effect, that would have been a gift *mortis causa*, not as a will, but that was allowed as testamentary, proved as a will, and stood. The only case wherein such a symbol seems to be held good is *Jones* v. *Selby;* but I am of opinion that amounted to the same thing as delivery of possession of the tally, provided it was in the trunk at the time. Therefore it was rightly compared to the cases upon 21 J. 1, *Ryal* v. *Rowles*, and others. It never was imagined on that Statute, that delivery of a mere symbol in name of the thing would be sufficient to take it out of that Statute; yet, notwithstanding, delivery of the key of bulky goods, where wines, &c., are, has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing: and therefore the key is not a symbol, which would not do. If so, then delivery of these receipts amounts to so much waste paper; for if one purchases stock or annuities, what avail are they after acceptance of the stock? It is true, they are of some avail as to the identity of the person coming to receive: but after that is over, they are nothing but waste paper, and are seldom taken care of afterwards. Suppose Fly, instead of delivering over these receipts to Mosely, had delivered over the broker's note, whom he had employed, that had not been a good delivery of the possession. There is no color for it; it is no evidence of the thing, or part of the title to it; for suppose it had been a mortgage in question, and a separate receipt had been taken for the mortgage-money, not on the back of the deed (which was a very common way formerly, and is frequently seen in the evidence of ancient titles), and mortgagee had delivered over this separate receipt for the consideration-money, that would not have been a good delivery of the possession, nor given the mortgage *mortis causa* by force of that act. Nor does it appear to me by proof, that possession of these three receipts continued with Mosely from the time they were given, in February to the time of Fly's death; for there is a witness who speaks, that in some short time before his death Fly showed him these receipts, and said, he intended them for his uncle Mosely. Therefore I am of opinion it would be most dangerous to allow this donation *mortis causa* from parol proof of delivery of such receipts, which are not regarded or taken care of after acceptance; and if these annuities are called *choses in action*, there is less reason to allow of it in this case than in any other *chose in action*, because stocks and annuities are capable of a transfer of the legal property by Act of Parliament, which might be done easily; and if the intestate had such an aversion to make a will as sup-

upon the footing of *donatio mortis causa*, or as appointments in nature of it. Mark Bell by his will, made in November, 1789, gave to the plaintiff Mary a legacy of £500, and to the plaintiff Jane a legacy of £100 and an annuity jointly with his sister for the lives of them and the survivor. He made several other bequests to a great amount; but gave the bulk of his fortune to his son; who afterwards became a lunatic. The transaction of the gifts to the plaintiffs, who were mutually evidence for each other, rested solely on their testimony; as no other person was present at the time. On their testimony it stood thus: "The testator sent for Mary Tate from London to his house at Battersea. On 25th January, 1790, he observed, that he was worth more than he thought; that his fortune was too much for one person; and therefore he would give away more than he had given by his will. He then desired Jane to give him out of his desk several bonds and securities to the amount of upwards of £3000 which he cancelled by tearing off the seals. He then told Mary, he would give her £200; and desired Jane to give him a cheque out of the drawer of his desk; which

posed, he might have transferred to Mosely: consequently this is merely legatory, and amounts to a nuncupative will, and contrary to the Statute of Frauds, and would introduce a greater breach on that law than ever was yet made; for if you take away the necessity of delivery of the thing given, it remains merely nuncupative. To this purpose consider the clauses in the Statute of Frauds relating to this; which seem to me to be applied directly to prevent a mischief of this sort. The clauses are in §§ 19, 20, 21, 22, which have very anxious provisions against dispositions of this kind, requiring three witnesses, solemn declaration of testator, fixing the place of making, and to be reduced into writing in six days after making. These are in cases where no will was made. Next comes another requisite, where a will has been made. If what the plaintiff insists on is right in point of law, that this gift of the annuities by delivery of the receipts was good, yet, though Fly had made a will before, it had been equally good notwithstanding that will, because this relates to revocation of a will in writing by anything amounting to a testamentary act. It would be good against the will, as appears from the cases. Would not that be quite contrary to the plain provision of this clause, taking away delivery of the thing? Here is then a revocation of a will by words only; viz., 'this is yours when I die.' All these clauses therefore will be overturned, if such evidence is admitted. But it is said, if this is not allowed, it will be impossible to make a donation *mortis causa* of stock or annuities, because in their nature they are not capable of actual delivery. I am of opinion, it cannot without a transfer, or something amounting to that: and there is no harm in it, considering how much of the personal estate of this kingdom, vastly the greatest proportion of it, subsists now in stock and funds: and all the anxious provisions of the Statute of Frauds will signify nothing, if donation of stock, attended only by delivery of the paper, is allowed. It might be supported to the extent of any given value, and would leave these things under the greatest degree of uncertainty; and amount to a repeal of that useful law as to all this part of the property of the subjects of this kingdom. Therefore, notwithstanding the strong evidence of the intent, this gift of annuities is not sufficiently made within the rules of the authorities; and I am of opinion not to carry it further. If any doubt remains in any one's mind, I will add (what I very seldom do, though it has been done by my predecessors) that I should be very glad to have this point settled by the supreme authority; for it highly ought to be settled, if there is a doubt, considering so large a property of this kind."

That railway stock cannot be the subject of a gift *mortis causa*, see *Moore* v. *Moore*, L. R. 18 Eq. 474, 483 (1874).

she did; and he immediately filled it up, signed it, and gave it to the plaintiff Mary. This was the cheque, upon which the first bill was founded. At the same time he gave the plaintiff Jane the promissory note for £1000 which was the subject of the other. The testator was infirm, but of sound mind at the time; and was not pressed or asked by either of the plaintiffs to do anything for them."

On January 26th the testator made two codicils; by one of which he revoked a devise to a nephew; and gave a legacy in lieu of it; and gave some diamonds, furniture, plate, &c. In the other he mentioned, that he had cancelled debts due to him from his two nephews; which were the securities he had according to the evidence of the plaintiffs cancelled the preceding day. The codicil expressed his intention by that cancellation to release those debts; and it also discharged other debts from other relations. Neither codicil took notice of the transaction of the preceding day, on which these bills were founded. The testator died four days after the codicils were made. He was eighty-three years old and very infirm: but there was no evidence of any particular illness.

The Solicitor-General [*Sir John Mitford*] and *Mr. Hollist*, for the plaintiffs.

Mr. Mansfield and *Mr. Campbell*, for the defendant.

Lord Loughborough, C. By the first of these bills it is supposed, that this cheque is totally ineffectual without the aid of this court. I have given the case much attention from a settled persuasion, that upon the part of the plaintiffs it is a proceeding perfectly fair and honest: but, though that is the color of the facts in the present instance, yet these cases are liable to the observations, which have been made, that to make a stretch to effect gifts, made to persons surrounded by relations who give evidence for each other, would be attended with great inconvenience. There is no doubt, that in this case the transaction is fair. If it fails, it is a case of mistake upon the part of the person, meaning to give, and also of mistake, or delicacy, upon the part of the person, to whom the gift was made; as if she had paid this away either for valuable consideration or in discharging a debt of her own, it would have been good; or even if she had received it immediately after the death of the testator, before the banker was apprised of it, I am inclined to think, no court would have taken it from her. But with all the disposition I feel to make it effectual, I must resist that impulse; as nothing is so dangerous as to decide upon circumstances of favor to particular parties; and, unless I can find some solid ground to support it, so that there will be no danger from the precedent, I cannot decree for the plaintiff. The claim of the plaintiff Mary is supported upon the ground, that the delivery must be *donatio mortis causa;* and is within the description given by Swinburne; and operated as an appointment of so much money in the banker's hands in favor of the person put in possession of the note, payable to bearer; and in support of this *Lawson* v. *Lawson*, 1 P. Will. 441, was cited and commented on. Upon the

other hand it was contended, that this was a banker's cheque, a common cash note; and that it would be a strain and confusion of terms to constitute it an appointment; that it is simply a gift: that they cannot claim as a legacy, nor as a debt; and therefore that this court will not give it more effect than it would have at law. I have looked into the cases; of which there have been several upon this question. The reasoning is generally taken from the civil law, and with great propriety; as the jurisdiction, in which these cases may as well occur as here, is the Ecclesiastical Court, which has properly followed the reasoning of the Roman law. All the passages in Swinburne are only references to different texts of the civil law; and where he defines *donatio mortis causa*, he is coupling the description of a legacy with a very short text of the civil law; and there is a perplexity in it. He takes it from a part of the civil law compiled at a time, when the subject itself rested in a degree of contradiction, and it was the common topic of debate, whether gifts under such circumstances resembled a gift or a legacy.

There are three species, of which he takes notice; first where a person, not terrified by fear of any present peril, but moved by the general consideration of man's mortality, makes a gift: the second is, where a person, being moved by imminent danger, gives so that the subject is immediately made his, to whom it is given: the third is where a person being in peril of death, gives something, but not so, that it shall presently be his, that received it, but in case the giver dies. The two first are clearly mere donations. Swinburne has there taken an authority from the Digest, which he refers to, and has copied. It does state these donations; and rates them all under the general title *Donatio mortis causa*. That is the time, when it was in dispute. "*Julianus* libro 17 Digestorum tres esse species mortis causa donationum ait; una cum quis nullo præsentis periculi metu conterritus, sed sola cogitatione mortalitatis, donat. Aliam esse speciem mortis causa donationum ait, cum quis imminente periculo commotus ita donat, ut statim fiat accipientis. Tertium genus esse donationis ait, si quis periculo motus non sic det, ut statim faciat accipientis, sed tunc demum, cum mors fuerit insecuta." If he had looked a little farther under the same title, he would have found there an opposite, but a much more correct, opinion; which finally prevailed, and was established as legal. It is the 27th law. "Ubi ita donatur mortis causa, ut nullo casu revocetur, *mors*" (that must be supplied) "causa donandi magis est, quam mortis causa donatio: et ideo perinde haberi debet atque alia quævis inter vivos donatio: ideoque inter viros et uxores non valet; et ideo nec Falcidia locum habet quasi in mortis causa donatione." In the institutions in the time of Justinian, Tit. 7, *De Donationibus*, there is a history given of these contests that had prevailed: and a definition is strictly given of what shall be *Donatio mortis causa*. "Mortis causa donatio est, quæ propter mortis fit suspicionem; cum quis ita donat, ut si quid humanitus ei contigisset, haberet is, qui accepit; sin autem supervixisset is, qui donavit reciperet: vel si eum donationis pœnituisset: aut prior decesserit is, cui

donatum sit. Hæ mortis causa donationes ad exemplum legatorum redactæ sunt per omnia; nam cum prudentibus ambiguum fuerat, utrum donationis an legati instar eam obtinere oporteret, et utriusque causæ quædam habebat insignia, et alii ad aliud genus eam retrahebant, a nobis constitutum est, ut per omnia fere legatis connumeretur; et sic procedat quemadmodum nostra constitutio eam formavit: et in summa mortis causa donatio est, cum magis se quis velit habere, quam eum, cui donat, magisque eum, cui donat, quam hæredem suum."

There it is clearly and correctly defined, that it had in effect the nature of a legacy; was liable to debts; and that it was only a gift upon survivorship; and the danger of suffering these gifts to be taken loosely occasioned at the same time with the passage, I have read, an ordinance by the Emperor, that it should be in writing with five witnesses. In the case before Lord Hardwicke, in which all the cases were very fully considered, he takes notice of this perplexity in the reasoning, before it was properly defined; but considers clearly, that by the law of England it cannot be a present, absolute, gift, but to take effect on the death of the party; and, following the line there, and supporting his own authority, he considers delivery essential. It is not necessary in this case to discuss, whether delivery is necessary in all cases. Perhaps it might not be difficult to conceive, that it might be by deed or by writing. It is clear, it could not be by mere parol; as saying, "*I give*," without an act, does not transfer the property. So far I concur with the reasoning in that case. It might be considered, if the case should arise, whether there would be any objection to a formal deed. I should think it not within the jurisdiction of the Ecclesiastical Court: and that the property so given is not to be possessed by the executor. It is bad against creditors; and therefore within the reach of creditors; but does not regularly fall within an administration; or require any act by the executor to constitute a title in the donee.

It was observed for the defendant, that the case of *Lawson* v. *Lawson* was overturned by Lord Hardwicke. I have caused the Register's book to be searched; and the report in P. Williams is certainly inaccurate: but the decision is perfectly right. The only doubt remaining with regard to the case was, whether it was not necessary in point of form to have authority from the Ecclesiastical Court: but I think the Master of the Rolls was right in not requiring probate. As it stands in the book, you take it only as matter of fact and evidence, that the money, for which the bill was given, was to be applied in mourning: but by the Register's book that was actually indorsed upon the bill. According to that in fear of a sudden change he did give to the defendant £100. That was an immediate gift. It proceeds to say that he drew a bill upon the defendant Middleton payable ten days after sight; and by a note in the bill of his own handwriting declared it to be for this defendant for mourning; and refers to the said note in writing in her custody. There were also contained in it directions concerning the children's mourning. The only question that could arise there, had the

argument taken a larger scope, than it did, was, whether this note should be proved. In the report you do not see the *ratio decidendi*. In one part the Master of the Rolls states it as an appointment; in another he lays stress on its being for mourning: but it was not necessary to prove it; as, taking the whole bill together, it is an appointment of the money in the banker's hands to the extent of £100 for the particular purpose expressed in a written appointment; which is a purpose, that necessarily supposes his death. Therefore that case is perfectly well decided. But upon that decision I cannot say, that in all events drawing a cash note upon a banker is an appointment of the money in his hands. Suppose, I was to apply that idea of an appointment, this is to take effect presently; and has no relation to his death. The plaintiff might have received it immediately. There is no reference at all to the case of her surviving him. It was not appointed under such circumstances, that it could not take effect but in case of his death: but it is stronger in this particular case; as by the evidence it was given, and fairly given. At the time he made this gift the act he was about to do was not legatory, to bequeath; on the contrary from the conversation, that took place, and the act, he was about to do, having considered what he had done by his will he meant to give more; and in doing so to make effectual gifts. Under that idea he cancelled those securities; not meaning them to be unavailable only in case of his death. In the same way he meant what he did for these plaintiffs as immediate gifts. Therefore I can make no more of this. I do not like to take it up upon favor to the parties, or to speculate upon it as an appointment. Being a gift it cannot be sued for as a legacy. I cannot make it better. If the law will not allow her to recover against the executor any more than against the banker, I lament it: but I cannot give it more effect than it can have at law. I do not know, whether it has been considered as to the possibility of bringing an action against the executor. If the promissory note can be made good at law, one should feel no reluctance to make it good: but they must stand, as they are at law; and this court cannot give the parties any relief. If there is anything intended to be done at law, I should have no difficulty to retain the bill; as if any accounts were to be had as to assets.

It was admitted, that the assets were abundant.

The Attorney-General [*Sir John Scott*] for the plaintiffs, said, that as to the promissory note they had opinions of common lawyers in favor of an action. He therefore desired time to consider upon it.

THE LORD CHANCELLOR asked, whether any hope was entertained, that they could recover at law upon the draft on the banker? The Attorney-General said, he did not know of any.

The first bill was then dismissed: but upon the application of the Attorney-General, without prejudice to any action at law; in order that it might not be considered as an authority against such action.

GARDNER *v.* PARKER.

CHANCERY. 1818.

[*Reported* 3 *Madd.* 184.]

RICHARD CROSSLEY being on terms of intimacy with the plaintiff (who had rendered the deceased various services), and being seriously ill, and confined to his bed, two days before his death, in the presence of a servant, gave the plaintiff a bond for £1,800, saying, at the same time, "There, take that and keep it." The defendants were the executors of Crossley, and the prayer of the bill was, that the plaintiff might be declared entitled to the bond; and that the defendants might be decreed to execute proper instruments to enable the plaintiff to recover and receive the money due on the bond; and that the plaintiff might be at liberty to make use of the names of the defendants in any action to be brought against the obligors, the plaintiff offering to indemnify the defendants against all costs.

Sir Samuel Romilly and *Mr. Roupell*, for the plaintiff.

Mr. Cooke, contra.

THE VICE-CHANCELLOR. [SIR JOHN LEACH.] The case of *Snelgrove* v. *Bailey*, 3 Atk. 214, has established, that there may be a *donatio mortis causa* of a bond, though not of a simple contract debt, nor by the delivery of a mere symbol. The doubt here is, that the donor has not expressed that the bond was to be returned if he recovered. This bond was given in the extremity of sickness, and in contemplation of death; and it is to be inferred, that it was the intention of the donor that it should be held as a gift only in case of his death. If a gift is made in expectation of death, there is an implied condition that it is to be held only in the event of death. The cases of *Lawson* v. *Lawson*, 1 P. Wms. 441; *Miller* v. *Miller*, 3 P. Wms. 358; and *Jones* v. *Selby*, Prec. Ch. 300, furnish this rule. Let it be declared that the plaintiff is entitled to this bond as a *donatio mortis causa*; and that, indemnifying the executors, he is at liberty to sue in their names, and let the costs be paid out of the testator's estate.

DUFFIELD *v.* ELWES.

HOUSE OF LORDS. 1827.

[*Reported* 1 *Bligh, N. S.* 497.]

THE EARL OF ELDON.[1] In the first of these causes there is an appeal from the judgment (1 Sim. & Stu. 244) of the then Vice-Chancellor,

[1] The opinion only is given.

the present Master of the Rolls, in which he makes this declaration, and from that part of the judgment the present appeal is brought. "This court doth declare, that this court being of opinion that a mortgage security cannot by law be given by way of *donatio mortis causa*, the appellant, Emily Frances Duffield, was not entitled to the mortgage moneys secured by the indentures of the 2d and 3d of November, 1820, and the bond of 12th July, 1820, and by the indentures of lease and release and mortgage, dated the 11th and 12th of July, 1820."

This judgment, therefore, proceeds upon the expression of an opinion, that a mortgage security cannot by law be given by way of *donatio mortis causa;* and if it be true that a mortgage security cannot by law be given by way of *donatio mortis causa*, it certainly then would be unnecessary to inquire whether the mortgage of November, 1820, and the bond of July, 1820, and the indentures of mortgage also of the 11th and 12th July, 1820, have been given by way of *donatio mortis causa;* because if a mortgage cannot be so given, it is quite unnecessary to consider whether, under the circumstances of this case, it can be held that there was a *donatio mortis causa*.

Before I proceed to state the opinion which I have formed upon this subject, it is my duty to the learned judge, from whose judgment this is an appeal, to say, that probably he has been influenced in the opinion which he has expressed by something which had fallen from me in a conversation with him, in which I had certainly expressed very great doubt whether a mortgage could be made the subject of a *donatio mortis causa*. I consider it just to state that this is so.

The judgment is commenced by the learned judge in the words I am now about to read. "The case of a bond, I consider to be an exception and not a rule; property may pass without writing either as a *donatio mortis causa*, or by a nuncupative will according to the forms required by the Statute. The distinction between a *donatio mortis causa* and a nuncupative will is, that the first is claimed against the executor, and the other from the executor. Where delivery will not execute a complete gift *inter vivos*, it cannot create a *donatio mortis causa*, because it will not prevent the property from vesting in the executors; and as a Court of Equity will not *inter vivos* compel a party to complete his gift, it will not compel an executor to complete the gift of his testator. The delivery of a mortgage cannot pass the property *inter vivos:* — first, because the action for the money must still be in the name of the donor; and secondly, because the mortgagor is not compellable to pay the money without having back the mortgaged estate, which can only pass by the deed of the mortgagee, and no court would compel the donor to complete his gift by executing such a deed. As to the case where a bond accompanied the mortgage deed" (I shall have occasion to state presently the distinction between the two mortgages), "I was at first inclined to think that as the bond alone, if it had been the only security for the debt, would under the decisions have passed as a *donatio mortis causa*, so it would draw after it the mort-

gage as being a collateral security for the same debt, — but upon further consideration I think that the delivery of the bond, where there is also a mortgage, cannot be considered as a gift completed. The mortgagor has a right to resist the payment of the bond without a re-conveyance of the estate, and it cannot be maintained that the donor of the bond would be compelled to complete his gift by such re-conveyance."

The principle which is applied in the decision of this case, is the principle upon which Courts of Equity refuse to complete voluntary conveyances. No Court of Equity will compel a completion of them, and throughout the whole of what I have now read, the donor is considered as a party who may refuse to complete the intent he has expressed; but I think that is a misapprehension, because nothing can be more clear than that this *donatio mortis causa* must be a gift made by a donor in contemplation of the conceived approach of death, — that the title is not complete till he is actually dead, and that the question therefore never can be what the donor can be compelled to do, but what the donee in the case of a *donatio mortis causa* can call upon the representatives, real or personal, of that donor to do; the question is this, whether the act of the donor being, as far as the act of the donor itself is to be viewed, complete, the persons who represent that donor, in respect of personalty — the executor, and in respect of realty — the heir-at-law, are not bound to complete that which, as far as the act of the donor is concerned in the question, was incomplete; in other words, where it is the gift of a personal chattel or the gift of a deed which is the subject of the *donatio mortis causa*, whether after the death of the individual who made that gift, the executor is not to be considered a trustee for the donee, and whether on the other hand, if it be a gift affecting the real interest, — and I distinguish now between a security upon land and the land itself, — whether if it be a gift of such an interest in law, the heir-at-law of the testator is not by virtue of the operation of the trust, which is created not by indenture but a bequest arising from operation of law, a trustee for that donee. I apprehend that really the question does not turn at all upon what the donor could do, or what the donor could not do; but if it was a good *donatio mortis causa*, what the donee of that donor could call upon the representatives of the donor to do after the death of that donor.

With respect to the question of fact, whether those mortgages and the bond were or were not given in such a manner as constituted a good *donatio mortis causa*, if there be no objection to the fact, that the subject of the mortgage was an interest in real estate, I do not apprehend that the gentlemen at the bar, though they criticised very much the nature of the evidence which has been given, meant to ask for any issue to try whether there was or was not a good *donatio mortis causa*, if a mortgage can be the subject of a *donatio mortis causa*. In some of the cases which I shall have occasion to mention, it will be seen that where there is any doubt whether in point of fact there was that which

would constitute a good *donatio mortis causa*, if in point of law the subject of it can be made the subject of a *donatio mortis causa*, it is a very familiar thing to direct an issue or issues to try that fact. That not having been desired, the case is to be considered on its merits. Supposing the testator to have the power, has he fallen into a mistake with respect to the subject which he did intend so to give, and has he attempted to make a good *donatio mortis causa* of property which he could not so transfer?

It is necessary to state, first, what these two mortgages are, for they differ in their nature. The first is a mortgage for a sum of between £2,000 and £3,000, and there is the usual bond. The other is the case of an interest conveyed by indentures of lease and release and assignment, the contents of which are such as I am about to state. There being property considerably more than £30,000 vested in trustees under a marriage settlement, they have advanced £30,000 to Sir Edwin Bayntun Sandys upon a mortgage of his estates and a bond, and judgment recovered upon that bond. The person who is supposed to have made this gift *causa mortis* afterwards advanced to the mortgagee that sum of £30,000, the mortgagor joining in the trust assignment of the mortgage. There was first an assignment of the money, the £30,000; secondly, an assignment of the judgment; and, thirdly, it contained a covenant to pay the money secured by the mortgage, which covenant formed a species of debt affecting the inheritance — the subject of the assignment to Mr. Elwes.

It appears that Mr. Elwes had been extremely angry with his daughter, who had married Mr. Duffield; but towards the close of life, and particularly when he came very near his death, he became very desirous to make a larger provision for his daughter; and, accordingly, in a conversation which he had upon the subject, he mentioned that there were these mortgages, one of two thousand odd hundred pounds, and another of thirty thousand pounds. Nobody, I think, who looks to the evidence, can doubt that it was his intention to make a gift of those mortgages for the benefit of that daughter whom he had restored to his favor, and, accordingly, he stated his purpose. He died the next morning. He was at the time in circumstances in which, it is clear, he apprehended that his death was approaching, and being extremely desirous to make some provision for his daughter, in the course of that morning he stated an intention upon the subject, which could leave no doubt in the mind of anybody what that intention was. It occurred afterwards that a declaration of this purpose should be made, and the question is, whether the form of that declaration was sufficient to constitute a gift of the property? There was no time to draw out a regular transfer of the property, but in the course of the morning there were brought to him the instruments, — the mortgages, the bonds, and so on; and it being suggested that it was necessary, in order to make a good *donatio mortis causa*, that there should be delivery of the instruments, subject to the question, whether such

delivery constituted a good *donatio mortis causa;* it appears by the evidence of the gentleman who had all these instruments in his hand, that Mr. Elwes took the hand of his daughter and laid it upon these instruments. The evidence presents an accurate account of the clear manifestation of his purpose to give, although that manifestation was accompanied with this circumstance — that he was so near the termination of his life, and so reduced, that he could hardly utter the words, but that it was more by a look than a word that he expressed his approbation of what was done. This was therefore a case where one cannot help feeling a very strong wish that it should take effect; but, it must be remembered, we cannot give that effect unless the law enables us to do it.

Improvements in the law, or some things which have been considered improvements, have been lately proposed; and if, among those things called improvements, this *donatio mortis causa* was struck out of our law altogether, it would be quite as well; but that not being so, we must examine into the subject of it.

I apprehend that the question is not a question between the donor and donee, but that the question is, whether the act is complete to this extent — that the donor gave this in such a manner as to constitute a good *donatio mortis causa* which will bind the interest in the executor as to the personal estate, and bind the interest in the heir-at-law with respect to the mortgage security as to the real estate? Because, I apprehend, that in a case where a *donatio mortis causa* has been carried into effect by a Court of Equity, that Court of Equity has not considered the interest as vested by the gift, but that the interest is so vested in the donee, that that donee has a right to call on a Court of Equity, and, as to the personal estate, to compel the executor to carry into effect the intention manifested by the person he represents. The only authority it will be necessary to cite for that doctrine is referred to in this decision. The case of *Gardner* v. *Parker*, 3 Madd. 184, is a decision by the same judge, and was under these circumstances: — It was a gift of a bond by delivering the same and saying, "There, take that and keep it," in the last sickness of the donor — the donor dying two days afterwards. This was held to be a *donatio mortis causa,* and it was directed that the donee should be at liberty to use the executors' names in suing on the bond, he indemnifying them, and the costs of the suit to be paid out of the testator's estate, which is founded on this reason, that the money may be recovered in a proceeding at law, by an action in the name of the executors; but if the executors refuse to permit their names to be used, a Court of Equity will compel them to permit their names to be used in consequence of the trust which arises from the act of the donor himself.

In another case of *Snellgrove* v. *Bailey*, 3 Atk. 214, "A bond for £100 was given by one Sparkman to Sarah Bailey, which Sarah Bailey delivered to the defendant, saying, 'In case I die, it is yours, and you will have something.' The plaintiff, as administrator to Sarah Bailey,

brought a bill to have the bond delivered up." There was a question whether there had been a *donatio causa mortis*, and the administrator there brought a bill to have the bond delivered up, as being in the hands of the alleged donee. Lord Hardwicke, however, decided, that this was a sufficient *donatio causa mortis* to pass the equitable interest, not the legal interest in the bond, upon the intestate's death. I find that Lord Hardwicke, in the case where there was a gift in the nature of a *donatio mortis causa*, directed that the representatives should be at liberty to file a bill to have the deeds delivered up, although he said they might bring *trover* for the deeds; but if the act of the donor had vested the deeds in the hands of the person in such a manner as to give an interest in the nature of a *donatio mortis causa*, there could be no equity to obtain the delivery up of those deeds unless the title had been settled at law.

The real question in this case is — not whether this was good as a *donatio causa mortis*, if the subject of delivery had been a bond alone, but whether the subject of delivery being mortgages, that is, estates in land in one sense of the word, such interests in land as those are can or cannot be made the subject of a *donatio causa mortis?* — A question which is left in a state of great uncertainty — a question noticed in some cases, but still left in a state of great difficulty; and I cannot but extremely lament that there should have been a decision upon a question of this importance with so little said either in argument or judgment upon the bearings of the cases to be found with reference to this subject. Upon looking into the cases, I observe that in the very first case I can find Lord Hardwicke to have decided, he expressed more doubt upon the subject than, in my humble judgment, speaking with great deference when looking at that great man's authority, former decisions upon the subject would have induced me to expect to find in his Lordship's expressions.

In the case of *Hassell* v. *Tynte*, Ambl. Rep. 318, in which a lady claimed to have a sum of £1,000 secured by mortgage, which she said she had become entitled to by a *donatio causa mortis* made by the donor (the testator is a wrong term in such a case) — there were two questions, one was a question of fact, namely, whether the circumstances were such as to constitute it a gift, if it was a proper subject of gift? The other — whether it was a proper subject of gift? Lord Hardwicke expressed a doubt whether a mortgage deed could be made the subject of a *donatio causa mortis*, and he finished the case by saying, "I observe that this lady, when she becomes twenty-one, is to be the residuary legatee of the testator, and as she will very soon attain the age of twenty-one, I will not keep up this controversy between her as claiming this £1,000 and the person entitled to the residue if she dies under twenty-one; the probability is she will arrive at the age of twenty-one, and then, as residuary legatee, she will be entitled to all the residue, and then it will become unnecessary to determine whether this £1,000 shall be settled upon her or not."

In the case of *Ward* v. *Turner*, 2 Ves. Sen. 431, which is a leading case upon this subject, Lord Hardwicke entered into a very long consideration of the case in his judgment. The question there was, whether some receipts for stock having been delivered over, it was a good *donatio causa mortis?* He was of opinion it was not; that the mere certificate of the stock was not a document of the title, and where no document of the title has been delivered there can be no transfer of the property, and he held that that was not a good *donatio causa mortis.*

In *Richards* v. *Symes*, 2 Atk. 319; 3 Barnard. 90; and 2 Eq. Ca. Abr. 617, Lord Hardwicke is represented as having decided, that if a mortgagee gave to his mortgagor the deeds of the mortgage, and that fact was proved, that was a gift of the money for which the deeds were a security, and not within the Statute of Frauds. Now the whole, or the greater part of the difficulty in determining whether the gift of a mortgage can be a good *donatio causa mortis*, turns upon this, — that the question arises how far the Statute of Frauds will allow of that. Lord Hardwicke was of opinion, according to this case of *Richards* v. *Symes*, that if a mortgagee gave to a mortgagor the deeds, the Statute of Frauds would not stand in the way; he held clearly that the mortgagee cannot get back the deeds from the mortgagor; then he said that the documents, the deeds being in the hands of the mortgagor, though the estate in the land was still in the mortgagee, yet by operation of law a trust would be created in the mortgagee to make good a gift of the debt to the mortgagor, to whom he had delivered the deeds, as the evidence that he forgave the debt and gave it up. We must consider the difference between the actual estate and a mortgage — and recollect that although a mortgage vests an estate in land (a fee simple mortgage of course vests a fee simple estate in land), yet it may be represented that there are two estates, one in the mortgagor and another in the mortgagee. A mortgage, for instance, does not revoke the will of the testator. A mortgage does not give dower — it is, in truth, nothing more than a pledge, and if the right to the principal is divested out of the mortgagee by a valid act to divest the right of the principal, the other is considered as what they call an accident, and then the question arises — not whether the land can be got out of the mortgagee without a conveyance, but whether, if the land is to be considered as still remaining vested in the mortgagee, he is not, by operation of law, a trustee for the mortgagor, bound to answer the subpœna of that mortgagor to reconvey the estate to him, and to execute the requisites of the Statute of Frauds.

In the case of *Hassell* v. *Tynte*, Lord Hardwicke makes the observation in giving his judgment: — that the case of *Richards* v. *Symes* was not a precedent of very considerable value; because, he says, that he had directed issues to try whether there was a gift by the mortgagee to the mortgagor, and those issues having ended in deciding that there was not, he considered that a precedent of very little authority. I con-

sider it, however, as a precedent of very considerable authority in such a case as this. It is reported at length in Barnardiston's Chancery Cases, and when I mention that reporter, I am sorry to have to add, that I am old enough to remember Lord Mansfield, who practised under Lord Hardwicke, by whom all these cases were decided, state his opinion of these reports, for he knew the man. I take the liberty of saying, that in that book there are reports of very great authority. The case happens to be reported likewise in another book of no very high character. I mean the second volume of the Equity Cases abridged. It is not so high in character as the first volume of the Equity Cases abridged; but the case as there reported, is reported from a manuscript note, and from a manuscript note which I think is better entitled to credit for this reason: that having called in assistance in this case (which I believe will be the first absolute determination upon the subject, though I think there is a great deal laid down in the cases which ought to lead us to decide what ought to be a good *donatio mortis causa*), I have found authority to consider that report to be a very correct report, in the library and in the mind, which are both equally large storehouses of equity learning — I mean the library and mind of Lord Redesdale. Upon this occasion, he has had the goodness to hunt through all the books he has upon the subject, as well manuscript as printed, and I come to the foundation of my opinion, with all the assistance I can have from that quarter.

According to both the reports, an issue had been directed. If there had been a good delivery, Lord Hardwicke seems to consider that the interest in the land would have passed: "But in all these cases," he says, "there is a difference, both at law and in equity, between absolute estates in fee or for a term of years, and conditional estates for security of money. In the case of absolute estates, it cannot be admitted that parol proof of the gift of deeds shall convey the land itself. But where a mortgage is made of an estate, that is only considered as a security for the money due, the land is the accident attending upon the other (and principal object), and when the debt is discharged the interest in the land follows of course." A trust of the land then arises by operation of law: when a deed is given a trust also arises by operation of law. "At law, the interest in the land is thereby defeated, and in equity a trust arises for the benefit of the mortgagor:" and his Lordship said, that "if an obligee delivers up a bond with intent to discharge the debt, the debt will certainly be thereby discharged, and the mortgage with it;" and if the bond is discharged in the present case, it is very difficult to say that the mortgage debt, as debt, will not be discharged also.

In reasoning the case of *Ward* v. *Turner*, and pointing out the distinction there is between the delivery of a mere chattel, and the delivery of anything which forms part of the title, Lord Hardwicke says this — and I find by a manuscript note in the possession of the noble Lord I have mentioned, that this is exceedingly correct — "Suppose it had

been a mortgage in question, and a separate receipt had been taken for the mortgage money, not on the back of the deed (which was a very common way formerly, and is frequently seen in the evidence of ancient titles), and the mortgagee had delivered over this separate receipt for the consideration money, that would not have been a good delivery of the possession, nor given the mortgage *mortis causa*, by force of the act" (2 Ves. 443). To be sure, that reasoning is quite idle, unless Lord Hardwicke meant to say that delivery of the deed, with a receipt upon the back of it, not by force of the delivery of the receipt on the back of it, but by force of the delivery of the deed, would be a good *donatio causa mortis*.

The case of *Richards* v. *Symes* was argued by Lord Mansfield, then Mr. Murray. The case of *Ward* v. *Turner* was also argued by Lord Mansfield, then Mr. Murray; and he appears to have a strong recollection of it, when he got into the Court of King's Bench, where sometimes equity has been rather more misunderstood than it ought to be, which has perhaps led some men belonging to that court to abuse equity, when they knew nothing about the matter. There is a case in the second volume of Burrows' Reports [1] — a case of very great importance — a case in which a man devised lands; the will, I think, was not attested by three witnesses, but he described the object of his devise of land. There was enough in his will to show that he meant to pass the personal interest in his property, and it was a question, whether there was a good devise of the mortgage or not. The land itself could not be said to be devised; but the Court of King's Bench held that it was a very good bequest of the personal interest: and Lord Mansfield, in summing up all this sort of doctrine, says, "A mortgage is a charge upon the land, and whatever would pass the money will carry the estate in the land along with it to every purpose." (That I admit is equity.) "The estate in the land is the same thing as the money due upon it — it will be liable to debts — it will go to executors — it will pass by a will not made and executed with the solemnities required by the Statute of Frauds. The assignment of the debt or forgiving it, will draw the land after it as a consequence: nay, it would do it, though the debt were forgiven only by parol, for the right to the land would follow notwithstanding the Statute of Frauds."

I ought to do it in a spirit of great humility, when I question the doctrine of Lord Mansfield. If he meant by that to say that such acts done with the money will have the effect in a Court of Equity of enabling you to call for a conveyance of land, I am ready to agree with him; but to say that the land is to be considered as passing under such circumstances, is that to which I cannot agree; but still I maintain that the doctrine from first to last is correct, provided you lay the foundation in the intent of the gift, that the debt is well given or well forgiven; and then, as the result of that interest so given, you say that the party who has the land becomes in equity

[1] *Martin* v. *Mowlin*, 2 Burr. 979.

a trustee for the person entitled to the money and to the personal estate.

Lord Hardwicke, with respect to the bond (and it is necessary that I should take some notice of this, because there has been a change in the law which that great judge did not foresee, but which, in later times, and in my own time, has become very familiar in the courts of law), — Lord Hardwicke states, as one ground of his opinion in the case of the bond, that it is a good gift *causa mortis*, because he says he who has got the bond may do what he pleases with it. He certainly disables the person who has not got the bond from bringing an action upon it: for, says Lord Hardwicke, no man ever heard (and I have seen in the manuscript of the same Lord Hardwicke, that he said no man ever will hear) that a person shall bring an action upon a bond without the *profert* of that bond; but we have now got into a practice of sliding from courts of equity into courts of law, the doctrine respecting lost instruments; and I take the liberty most humbly of saying, that when that doctrine was so transplanted, it was transplanted upon the idea, that the thing might be as well conducted in a Court of Law as in a Court of Equity, a doctrine which cannot be held by any person who knows what the doctrine of Courts of Equity is as to a lost instrument.

Then, if the delivery of a bond would, as it is admitted (notwithstanding any change in the doctrine about *profert*) — if the delivery of a bond would give the debt in that bond, so as to secure to the donee of that bond the debt so given by the delivery of the bond, the question is, whether the person having got, by the delivery of that bond, a right to call upon the executor to make his title by suing or giving him authority to sue upon the bond, what are we to do with the other securities if they are not given up? But there is another question to which an answer is to be given: what are we to do with respect to the other securities, if they are delivered? In the one case, the bond and mortgage are delivered; in the other, the judgment, which is to be considered on the same ground as a specialty, is delivered — with that, the evidences of the debts are all delivered. The instrument containing the covenant to pay is delivered. They are all delivered in such a way that the donor could never have got the deeds back again. Then the question is, whether, regard being had to what is the nature of a mortgage, contradistinguishing it from an estate in land, those circumstances do not as effectually give the property in the debt as if the debt was secured by a bond only?

The opinion which I have formed is, that this is a good *donatio mortis causa*, raising by operation of law a trust; a trust which being raised by operation of law, is not within the Statute of Frauds, but a trust which a Court of Equity will execute; and therefore, in my humble judgment, this declaration must be altered by stating that this lady, the daughter, is entitled to the benefit of these securities, and with a direction to the Court of Equity to proceed in the cause, on the ground of the principle to be found in such a declaration to be made

by your Lordships, which, with respect to that part of the case, I take the liberty to advise your Lordships to adopt.

Mr. Sugden and *Mr. Longley*, for the appellants.

Mr. Heald and *Mr. M. West*, for the respondents, the children of Mr. and Mrs. Duffield.

HILLS *v.* HILLS.

EXCHEQUER. 1841.

[*Reported* 8 *M. & W.* 401.]

ASSUMPSIT for money had and received to the use of the plaintiff as administrator. Plea, *Non assumpsit.* At the trial before *Rolfe*, B., at the Middlesex sittings after last term, the facts appeared to be as follow: —

The plaintiff's intestate, Mrs. Limmer, when in her last illness, and on the day of her death, went to bed, and sending for the landlady of the house where she lodged, told her that "she felt much worse, and she wished her brother James (the defendant) to bury her; that she wished him to have all she had, and he would bury her comfortably." At that time her pocket-book, containing a sum of about £80 in cash and notes, was lying on the bed. She said her pocket was very dirty, upon which a clean one was brought, and the pocket-book was put into it, and placed upon the pillow. She then fell asleep for a short time, and on awaking asked for the pocket-book, took out a half sovereign, and having paid 10*d.* for some household expense, put the change into the pocket-book, and replaced it on the pillow. Shortly afterwards the defendant came to see her, and she then, in the presence of the landlady, and a few minutes before her death, put the pocket-book into his hands. It was to recover the amount of the money contained therein that this action was brought. For the defendant, two points were made: first, that this was an absolute gift *inter vivos*, which could not be questioned by the administrator; or secondly, that it was good as a *donatio mortis causa.* The learned judge thought that it could not be deemed to amount to a gift *inter vivos;* and as to the latter question, he left it to the jury to say whether it was intended as an absolute gift to the defendant after the death of the intestate, or whether she intended to retain a control on the property during her life: and the jury finding in the affirmative of the former branch of the proposition, the verdict, under his lordship's direction, was entered for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him for £75.

Kelly now moved accordingly.

LORD ABINGER, C. B. I think no rule ought to be granted. The facts upon which the question depends were for the jury, and their

finding has determined the point. If indeed in law there could be no *donatio mortis causa* coupled with a condition, the defendant could not succeed; but upon the authorities, that appears not to be so; property may be given by way of *donatio mortis causa*, although the gift be made for a special purpose, and coupled with a trust.

PARKE, B. The only question for us to determine is, whether what is otherwise a *donatio mortis causa*, as found by the jury, is less so because coupled with a condition that the donee shall pay the expenses of the funeral. That circumstance afforded a strong argument to the jury as to the construction to be put upon the expressions used by the deceased, and that a mere nuncupative will was meant, of which the defendant was to be the executor. But the jury have excluded that argument, by finding that there was a delivery which was intended to transfer the property in the money, subject to the contingency of the donor's recovering, and coupled with the condition of payment of the funeral expenses by the defendant; and the only question now is, whether that condition makes it void. It is not, indeed, properly a *condition*, because otherwise the property would not vest until performance of it, but a *trust*, upon which the *donatio mortis causa* was made. And the authority to which I have already referred, of *Blount* v. *Barrow*, 4 Bro. Ch. C. 72, goes the length of deciding that it is no objection to the gift that it is made for a special purpose. There India bonds were given by the deceased to the party, subject to the condition of his carrying on a Chancery suit, and the gift was nevertheless held to be a good *donatio mortis causa*. I cannot distinguish that case from the present. It follows, therefore, that a gift made for a special purpose, and coupled with a trust, may be good as a *donatio mortis causa*; although I agree that upon this particular trust a very strong argument arose that the deceased did not intend to make a *donatio mortis causa*, but as it were to make the defendant her executor under a nuncupative will.

ALDERSON, B. I am of the same opinion. The case of *Blount* v. *Barrow* decides, that a *donatio mortis causa* may be made for a particular purpose; that the party may deliver the subject-matter of the gift so as to pass the property to the donee, in contemplation of death, although he is to use it for a particular purpose, or out of it to make particular payments, and to keep the residue for himself. That case is entirely in point.

ROLFE, B. I am of the same opinion. I told the jury that a *donatio mortis causa* was always to be viewed with suspicion: but if it be allowed at all, I cannot see how the annexation of a trust to the gift can make any difference. If it be lawful so to give the property out and out to the party for his own use, I cannot see that it makes any difference that with it he is to pay for a particular thing. If a man on his death-bed gives another £1,000, is it any addition to the evils attending this mode of bestowing property that he attaches a condition to it — as, for instance, that he stipulates that his brother shall receive

an outfit to India? The case of *Blount* v. *Barrow* is expressly in point, and disposes of the question; and I have no doubt that other cases to the same effect might be found.

Rule refused.[1]

MOORE *v.* DARTON.

CHANCERY. 1851.

[*Reported* 4 *De G. & Sm.* 517.]

THIS was an administration suit, which now came on to be heard upon exceptions to the report of the Master; and the question was, whether the delivery of two documents constituted a *donatio mortis causa*. The testatrix had advanced to William Moore, one of the plaintiffs, £600, and had taken from him upon that occasion the two documents in question signed by him, and which were as follows:

Received the 22d of October, 1843, of Miss Darton Five Hundred Pounds, to bear interest at 4 per cent. per annum, but not to be withdrawn at less than six months' notice.

£500. WILLIAM MOORE.

Received the 22d of October, 1843, of Miss Darton, for the use of Ann Dye, One Hundred Pounds, to be paid to her at Miss Darton's decease, but the interest at 4 per cent. to be paid to Miss Darton.

£100. WILLIAM MOORE.

(I approve of the above) BETTY DARTON.

The transactions relied upon as constituting the *donatio mortis causa* took place on June the 28th, 1845, between Miss Darton and Ann Dye, who was mentioned in the second memorandum, and who was Miss Darton's lady's maid. It was thus described by the lady's maid in her evidence.

"Late in the afternoon of the same day I did assist the said Betty Darton in leaving her bed, and she did, after having so risen, take from the said drawer the said two produced memorandums or receipts, marked respectively A. and B., and she then again placed them in my hands, at the same time requesting me to take care of them, and be sure and not let her nephew Mr. Thomas Harwood Darton see them, and not to let either of them go out of my possession until after her death; and she then directed me, that, immediately upon her death, I was to give the two receipts or memorandums to the said plaintiff William Moore; and her object or purpose in giving me such directions as aforesaid, as she told me and as I believe, was, that she wished

[1] Contra, *Bibby* v. *Coulter* (Court of Exchequer in Ireland), Ridg. temp. Hard. 206, note (1791).

that at her death the said debt or sum of £600 so due to her from the said plaintiff William Moore should be cancelled."

Miss Darton died ten days afterwards.

The Master found, that the £600 was an outstanding debt from the plaintiff William Moore, who now excepted to that finding.

Mr. Swanston and *Mr. Moxon* supported the exceptions.

Mr. Walker and *Mr. Pryor*, contra.

Mr. Marshall for other parties.

The Vice-Chancellor. [Sir J. L. Knight Bruce.] The case as to the £100 is, I think, beyond the influence of the question, whether there was a *donatio mortis causa ;* for, in my opinion, an effectual trust was declared, *inter vivos*, in favor of the servant maid. The document relating to this sum appears to have been written contemporaneously with the creation of the debt. It is thus: [His Honor read it]. Now, although this was not then signed by Miss Darton, yet it is probable, that, as she so intended the transaction, and as she received the document, she would be deemed to have assented to it, even without signing it. But, in fact, she afterwards signed it. Mr. Moore therefore became a trustee of the amount for Miss Darton during her life, and for Ann Dye after Miss Darton's death.

With respect to the £500, the question is much less simple; and I confess that it appeared to me not free from doubt, whether the Wills Act had not precluded any donations *mortis causa* from taking effect. But it does not seem to have ever been so decided or so argued. If, against the ordinary rules of construction, a Statute, passed for the purposes of the revenue, can be referred to for the purpose of determining a question of law beyond its scope, it appears that a Revenue Act has in a manner recognized the existence of such gifts.

My own opinion is, that, according to the true interpretation of the Wills Act, that Statute does not avoid such donations.

The next question is, whether there was a *donatio mortis causa* of this debt. The debt was due from Mr. Moore himself; and the document, the delivery of which is said to constitute a *donatio mortis causa*, was placed in the hands of Ann Dye, and I think, upon the evidence, was placed in the hands of that person as the agent of Mr. Moore, with an intention, which appears to me sufficient, to constitute its delivery a *donatio mortis causa*. If, therefore, by the law an interest of this description can be made the subject of a *donatio mortis causa*, I am of opinion that there was such a gift of it in the present case.

In deciding this case as I mean to do, I certainly have not the slightest intention of contravening anything that has been said by Lord Hardwicke, Lord Rosslyn, or Lord Eldon, if I could with propriety do so. My decision I consider to be consistent with every word that has been attributed to these eminent judges.

It is true, that the delivery of a bond is not the delivery of the mere evidence of a debt, for it is the delivery of that without which the debt would not have been a specialty.

Its continuance in existence is not now material, however that might have been considered formerly. The delivery of an instrument creating a specialty debt, without which it would not be a specialty debt, as in the case of a bond, would be sufficient for the purpose of a *donatio mortis causa;* and so Lord Eldon decided as to a mortgage. That, however, I agree does not go the length of deciding that the delivery of the mere evidence of a debt would be sufficient. In this case there was something more. The document here has been called a receipt, and is a receipt in a sense, but it is not a receipt in the ordinary acceptation of that term. It was a document contemporaneous, I take it, with the creation of the debt. [His Honor read it.] Now this is the document which was delivered to the agent of the debtor himself. The debt was a debt carrying interest. A mere debt of £500 would have arisen from a loan, without any writing. But it would not have been a debt carrying interest, without a contract to that effect beyond the advance. That particular contract, I agree, might have been entered into without writing; but, as it was created by writing, proof of the writing, if possible, was essential to recover upon the contract. This writing was therefore in a sense essential to the proof of the contract; and it is this writing which was, in substance, delivered *mortis causa* to the person owing the money. In my opinion it is consistent with what was said by Lord Hardwicke, Lord Rosslyn, and Lord Eldon, with the civil law and our own, to hold, as I do, that this was a sufficient delivery to constitute a *donatio mortis causa*, which, in my judgment, it was intended to be.

VEAL *v.* VEAL.

CHANCERY. 1859.

[*Reported* 27 *Beav.* 303.]

THE testatrix, Frances Veal, died on the 29th of March, 1858. She possessed two promissory notes for £60 and £120, both of which were in the following form:—

Box, March 17th, 1852.

On demand, I promise to pay to Miss Frances Veal *or order* the sum of £60, with lawful interest for the same. For value received.

CATHERINE ROWE.
ELIZABETH NOBLE.
£60. THOMAS NOBLE.

Shortly previous to her death, being told by her medical attendant that her complaint would terminate fatally, she delivered over the two promissory notes, unindorsed, to her niece, Mary Maslen, by way, as was alleged, of a *donatio mortis causa.* Mary Maslen retained them down to the death of the testatrix, and now claimed the amount.

The validity of this gift was contested, on the ground that a promissory note payable to order, and not indorsed, could not be made the subject of a *donatio mortis causa*.

Mr. R. Palmer and *Mr. Southgate*, for Mary Maslen.

Mr. Selwyn and *Mr. Locock Webb*, for the plaintiff.

Mr. Lloyd and *Mr. T. E. Lloyd*, for the defendant.

The Master of the Rolls. [Sir John Romilly.] The question in this case is, whether a testatrix has made a good *donatio mortis causa* of two promissory notes payable to the testatrix "*or order*," she not having indorsed them. It is solely a question whether such a donation is really good, and if anything more remains to be done by the donor; the state of the authorities is by no means satisfactory. The earlier authorities point very distinctly in one direction, as *Miller* v. *Miller*, 3 Peere Williams, 356; *Ward* v. *Turner*, 2 Ves. Sen. 431. Lord Hardwicke extended the doctrine to a bond, but he said he would go no further. Then comes the case of *Duffield* v. *Elwes*, 1 Sim. & St. 239; 1 Bligh, N. S. 497, in which Sir John Leach laid it down, that the same principle which applied to voluntary gifts *inter vivos* was applicable to donations *mortis causa*, and that if, in the case of a *donatio mortis causa*, something more remained to be done by the deceased person, which this court would not have compelled him to do in his lifetime, it could not be a good *donatio mortis causa* after his death. Lord Eldon came to an opposite conclusion, but he does not appear to have overruled the former decisions; and in that state of the authorities, it becomes very embarrassing to ascertain what the state of the law now is.

I have gone through the cases and some notes of a case not reported, but which is to be found in Chitty on Bills, namely, *Rankin* v. *Weguelin*. I thought that case extremely important, because it is stated that the bills were payable to order, and I find that the registrar's book fully bears out the conclusion stated in Chitty. It appears from the papers that the bills were drawn on the East India Company in favor of Colonel Weguelin or order, and were accepted; but it does not appear, from the papers, whether they were indorsed by Colonel Weguelin. Shortly before Colonel Weguelin's death, he gave them to his wife. The Master, in taking the accounts, included them in the outstanding estate of the testator, and the widow took an exception to his report. It was heard on the 7th of June, 1832, and it appears beyond all doubt, that the case was argued. The registrar's note-book states, that Mr. Bickersteth opened the exception, and that Mr. Pemberton and Mr. Rolfe were heard in favor of the report, and that several affidavits were read. The court took time to consider, and on the 14th of June, judgment was delivered by Sir John Leach, who allowed the exception and made a declaration that there was a good *donatio mortis causa*.

It is, therefore, precisely the point which arises in the present case, and as it is a decision of Sir John Leach, whose decision in *Duffield* v.

Elwes was overruled by the House of Lords, and who, therefore, must have considered that the decision of the House of Lords had settled the question, I feel bound by it. I also think it a much more healthy state of the law, that the validity of such a gift should not depend on whether the testator had written his name on the back of the bill or not, if it be clear that he intended to give them. I will, therefore, make a declaration, that the two notes passed to Mary Maslen.[1]

AMIS *v.* WITT.

CHANCERY. 1864.

[*Reported* 33 *Beav.* 619.]

THE plaintiff David Amis claimed, as against the defendant Stephen Witt, the administrator of Prisciller Floyd, a policy of assurance of the Kent Mutual Assurance Society for £1,000 on her own life, and a deposit note for £400 of the National Provincial Bank of England, which he alleged the intestate had, on her death bed, delivered to him, the plaintiff, by way of *donatio mortis causa*.

Upon the trial of an action at law the jury gave a verdict for Amis, affirming the donation. The judge reserved the point whether a policy of assurance and a bank deposit note could be the subject of a *donatio mortis causa*, and upon a motion for a new trial the Court of Queen's Bench held they could, and refused to disturb the verdict, 1 Best & Smith, 109.

The cause now came on for hearing.

Mr. Selwyn and *Mr. Beavan*, for the plaintiff, argued that the trial at law had determined that the policy and deposit note might be the subject of a *donatio mortis causa*, and had also settled the fact of the gift.

Mr. Bagshawe argued, that the verdict had only determined the right to the papers, and not to the money secured by them, and that the right to the money on such instruments, which were not transferable, could not pass as a *donatio mortis causa*. *Duffield* v. *Elwes*, 1 Bl. N. S. 497; *Veal* v. *Veal*, 27 Beav. 303; *Barton* v. *Gainer*, 3 Hurl. & N. 307; *Moore* v. *Darton*, 4 De G. & Sm. 517, were cited.

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY] held that the plaintiff was entitled to the policy and deposit note, and to the money paid in respect of them, as *donationes mortis causa*.[2]

[1] So a cheque of a third person to the donor unindorsed, *Clement* v. *Cheesman*, 27 Ch. D. 631 (1884); and so an unindorsed bill of exchange in favor of the donor. *In re Mead*, 15 Ch. D. 651 (1880). But *Bradley* v. *Hunt*, 5 G. & J. 54 (1832), is *contra* the principal case.

[2] So as to deposit note, *Moore* v. *Moore*, L. R. 18 Eq. 474 (1874); and see *Basket* v. *Hassell*, 107 U. S. 602. Cf. *In re Mead*, 15 Ch. D. 651.

HEWITT *v.* KAYE.

CHANCERY. 1868.

[*Reported L. R.* 6 *Eq.* 198.]

THIS was a special case.

Elizabeth Harrison in 1860 founded a charity called St. Scholastica's Retreat, and in 1861 she founded a charity called St. John's Hospice. By her will, made in September, 1866, she gave all her residuary pure personalty to the trustees of St. Scholastica's Retreat. On the 15th of October, being on her death-bed and in contemplation of her death, she expressed a desire to alter the deed of settlement of St. John's Hospice, and to vest £600 in the trustees of St. John's Hospice upon the trusts of the deed as amended, and accordingly she instructed her solicitor to prepare a deed altering the settlement, and a codicil giving the £600, but she died before either of these documents could be prepared. In the mean time, believing that she would not have time to execute the deed and codicil, she signed and gave to one of the trustees of St. John's Hospice a cheque on her bankers for £600, but she died before it was possible to present the cheque.

The question in the special case, in which the trustees of St. John's Hospice were the plaintiffs, and the executors and the trustees of St. Scholastica's Retreat were the defendants, was, whether the trustees of St. John's Hospice were entitled to receive the sum of £600, the amount of the cheque, out of the testatrix's assets by way of *donatio mortis causa*, or otherwise.

Mr. Bagshawe, for the plaintiffs.

Mr. Speed, for the defendants.

LORD ROMILLY, M. R. I am of opinion, both upon principle and upon authority, that this is not a valid *donatio mortis causa*. When a man on his death-bed gives to another an instrument, such as a bond, or promissory note, or an I O U, he gives a *chose in action*, and the delivery of the instrument confers upon the donee all the rights to the *chose in action* arising out of the instrument. That is the principle upon which *Amis* v. *Witt*, 33 Beav. 619, was decided, where the donor gave the donee a document, by which the bankers acknowledged that they held so much money belonging to the donor at his disposal, and it was held that the delivery of that document conferred upon the donee the right to receive the money. But a cheque is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at a banker's or anywhere else. It is an order to deliver the money; and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing. The testatrix gave this cheque at night, and she died in the course of the same night before it could be presented; suppose she had said, "I have got £600 in my

desk; bring it to me, and I will give you the money," and had died before it was brought to her, that would have been no gift; and the gift of a cheque is the same thing; it is worth nothing until acted upon, and the authority to act upon it is withdrawn by the donor's death. All the authorities decide that there must be complete delivery; the only case at all tending the other way is *Lawson* v. *Lawson*, 1 P. Wms. 441, but that has been explained by Lord Loughborough on the principle that the drawing of the bill was in the nature of an appointment. The question must be answered in the negative.[1]

ROLLS *v.* PEARCE.

CHANCERY DIVISION. 1877.

[*Reported* 5 *Ch. D.* 730.]

THIS was a special case stated for the opinion of the Chancery Division of the High Court of Justice under the Act of 13 & 14 Vict. *c.* 35.

The plaintiffs were the trustees and executors of the will of Richard Lano Pearce, dated the 8th of November, 1870, and the defendant was his widow, who took certain benefits under the will, subject to which the beneficiaries were the testator's two infant children.

On the 13th of October, 1871, the testator left England with his wife, the defendant, and resided at San Remo, in Italy, where they remained till his death, which happened on the 7th of February, 1872.

On the 5th of December, 1871, the testator became seriously ill, and a doctor who was called in pronounced the disease a fatal one, and gave it as his opinion that he would not live many hours. But in the course of the day he rallied slightly, and called for pen, ink, and paper, and his cheque-book. The defendant, Mrs. Pearce, fearing that the act of writing would fatigue and excite him, remonstrated with him, but nevertheless he filled up and signed a cheque on his London bankers for £100, which ran as follows: —

34, OLD BOND STREET, LONDON,
5th December, 1871.

THE CITY BANK, BOND STREET BRANCH.

order

Pay Mrs. Pearce or ~~bearer~~ (*sic*) one hundred pounds.

£100. 0. 0. R. LANO PEARCE.

When the testator had filled up and signed this cheque, he tore it from the counterfoil and handed it to Mrs. Pearce, and he afterwards wrote some letters.

[1] So, although the cheque is accompanied by a pass-book, *Beak's Estate*, L. R. 13 Eq. 489 (1872). See *In re Mead*, 15 Ch. D. 651.

Cf. *Harris* v. *Clark*, 49 N. Y. 93.

Early in the morning of the 2d of February, 1872, the testator, who was then very weak, was visited by two friends. During the visit he asked for his cheque-book, and said that he wished to give his wife a cheque, and also desired to make a codicil to his will. One of the friends accordingly, at the request of the testator, filled up a cheque for £250 in a form exactly similar to that of the £100 cheque previously given. The same friend also wrote out on a piece of paper the following:

"Codicil to my will. I freely give to my dear wife all my property in San Remo."

The cheque and codicil were then signed by the testator, and the codicil duly attested by the two friends.

The testator never recovered from his illness, and died on the 7th of February, 1872.

During the testator's lifetime Mrs. Pearce indorsed the cheques to "Messrs. Asquasciati Frères" (who were bankers at San Remo), "or order," and then paid them into Messrs. Asquasciati Frères' bank. The cheques were subsequently indorsed by them to other persons, and negotiated in the ordinary course of business, and Mrs. Pearce drew upon Messrs. Asquasciati Frères against the cheques, and, it was said, paid debts of her husband out of the proceeds.

On the 13th of February, 1872, the cheque for £250 came into the possession of the Union Bank of London, and was presented by them for payment at the City Bank, and on the 15th of February the £100 cheque came into the possession of Messrs. Barclay & Co., and was by them also presented for payment at the City Bank.

The City Bank, however, refused payment of both the cheques, on the ground that as the testator (who was the drawer), had died on the 7th of the same month, they had no authority to make the payments. In consequence of this, the defendant was obliged to refund what she had received upon the cheques.

The question was whether the gift of the cheques and their subsequent negotiation by the defendant during the testator's lifetime constituted a good *donatio mortis causa*, so as to entitle the defendant, as the holder of them, to payment as against the plaintiffs out of the testator's estate, notwithstanding the death of the testator before they were presented for payment.

Glasse, Q. C., and *Hollis*, for the plaintiffs.

Locock Webb, Q. C., and *Alfred Bailey*, for Mrs. Pearce.

Malins, V. C., after referring to the facts, continued:—

The law seems to be in a very curious state. The result of the authorities appears to be that a gift of a bill of exchange, which is by its very nature payable at a future day, may be a good *donatio mortis causa*, but the gift of a cheque is not valid unless it is presented for payment or paid before the death of the donor. I am satisfied that the object of this testator was to give these cheques to his wife. Therefore I think I ought to do all I can to make the gift good.

Now I can really see no reason why if a bill drawn on a goldsmith

would be a good *donatio mortis causa* a cheque should not be so too. A distinction has, however, been drawn between the case of a bill of exchange and that of a cheque payable to bearer, and if these cheques had been made payable to bearer and had not been presented for payment at the bank on which they were drawn before the donor's death, I should probably have considered that I was bound to hold that there was not a good gift.

But these are cheeks payable to order; and it is clear that the testator knew that they could not be presented for payment either on the day they were drawn or the subsequent day. I must attribute to him the knowledge that the cheque would not be paid for some time, and on that ground I come to the conclusion that this case differs from the other cases of cheques. But I have also the decision of Lord Loughborough in *Tate* v. *Hilbert*, 2 Ves. 111. He there says (p. 118): "If she had paid this away either for valuable consideration or in discharging a debt of her own, it would have been good; or even if she had received it immediately after the death of the testator, before the banker was apprised of it, I am inclined to think no court would have taken it from her."

In this case I have the very distinction thus pointed out by Lord Loughborough. Mrs. Pearce did pay away the proceeds of the cheque, and, it would seem, amongst the husband's creditors. And I think that when a man gives his wife a cheque it is in substance as complete a gift as if he handed her the cash. It is, however, said that in the report of *Tate* v. *Hilbert*, in Brown's Chancery Cases, an additional circumstance is mentioned in the judgment, and Lord Loughborough is made to say (4 Bro. C. C. 291): "If the note had been paid away for valuable consideration, and the money received at the bankers before notice of the death of the party, or immediately after, it might have availed." If there is any real discrepancy, I think that the report in Vesey is probably the more accurate, and that it was intended to be held that an actual dealing for value with a note would complete the gift as a valid *donatio mortis causa*.

I consider, therefore, that Mrs. Pearce has made out a good title to the proceeds of the cheques, and I will answer the first question in the case in the affirmative.

M'GONNELL *v.* MURRAY.

IRISH CHANCERY. 1869.

[*Reported I. R.* 3 *Eq.* 460.][1]

THE cause petition was filed for the administration of the personal estate of Margaret Morgan, who died intestate on the 23d of January, 1867, by Kate M'Gonnell, who claimed as a *donatio mortis causa* a sum of £70 5*s.* 8*d.*, deposited in the Abbey-street Savings' Bank in the name of the deceased. Master Litton, to whom the matter was referred, by an order of the 18th of January, 1868, declared that the gift by the intestate to the petitioner of the savings' bank book constituted a good *donatio mortis causa* of the £70 5*s.* 8*d.* and interest standing to her credit in the bank.

[The statement of the evidence is omitted.]

A printed copy of the rules of the savings' bank was produced. The following rules were relied on: —

"XIII. PRODUCTION OF THE DEPOSITORS' BOOKS. — That the offices of the savings' bank shall be open on five days of the savings' bank year, on which the book of each depositor shall be produced at the office of this savings' bank for the purpose of being inspected, examined and verified with the books of the institution by the auditor or auditors."

"XV. REPAYMENTS. — Depositors by themselves, or by any party producing a power of attorney from them, shall be repaid the whole or any part of the sums they shall have lodged, together with the interest due thereon, on giving one week's notice to the clerk in attendance at the office of the institution. Powers of attorney are issued free on giving notice."

Mr. Walsh, Q. C., *Mr. O'Hagan*, Q. C., and *Mr. Roper*, in support of the appeal.

Mr. Lawless, Q. C., *Mr. Jellett*, Q. C., and *Mr. Daniel*, in support of the Master's order.

THE MASTER OF THE ROLLS, [JOHN EDWARD WALSH, first considered the evidence. This part of the opinion is omitted. He then continued.]

If, therefore, the matter had come before me originally, I should have held that the evidence is not sufficient to establish a gift of this kind. But Master Litton having held otherwise, though I do not think that the principle laid down in the case of *Gillespie* v. *Croker*, 15 Ir. Ch. R. 182, would apply to this case, still I cannot but hesitate before coming to a different conclusion as to the question of fact, so as to act against his opinion. However, having heard the question of law ably discussed, I have come to a conclusion unfavorable to the gift on it also.

To constitute a valid *donatio mortis causa*, there must be an actual delivery of the subject of the gift, and a delivery of a thing by way of

[1] Part only of the case is given.

symbol, according to the opinion of Lord Hardwicke in *Ward* v. *Turner*, 1 W. & T. 831, is not sufficient. In *Snellgrove* v. *Baily*, 3 Atk. 214, Lord Hardwicke held that a bond could be the subject of such a gift. In *Duffield* v. *Elwes*, 1 Dow & Cl. 10; 1 Bli. N. S. 536, the House of Lords held that the same doctrine applied to mortgages, following an opinion previously expressed by Lord Hardwicke in *Richards* v. *Syms*, Barnard. Ch. Rep. 90. This doctrine must originally, I rather think, have been founded on the peculiar rules applicable to a specialty of which profert was necessary at law, and the gift of which, with power to retain or destroy it, was consequently a gift of that without which the debt could not be enforced, and in analogy to the distinction established respecting *bona notabilia*. The doctrine has been since supported on the ground that the specialty itself creates and gives a peculiar character to the debt. It has also been extended to other contracts not under seal, *ex. gr.* to bills and promissory notes. It was carried very far by Lord Romilly in *Veal* v. *Veal*, 27 Beav. 303, where he held that an unindorsed promissory note payable to order can be made the subject of such a gift. The contrary appears to have been held by Lord Hardwicke in 1735, in *Miller* v. *Miller*, 3 P. Wms. 358, and in *Tate* v. *Hilbert*, 2 Ves. 111, in which Lord Rosslyn considered that with instruments of this nature no greater effect could be given to the gift in equity than it has at law. In *Rankin* v. *Weguelin*, 27 Beav. 309, relied on by Lord Romilly, it does not appear whether the notes were indorsed or not. But the law has fluctuated much since the earlier decisions. *Moore* v. *Darton*, 4 D. & Sm. 517, was a case where a creditor gave up to a person on behalf of the debtor a special memorandum of the terms of the loan, partly in the form of a receipt. The decision is put on the ground that the memorandum was something more than mere evidence of the debt; and the Vice-Chancellor, Sir Knight Bruce, seems to lay stress on the circumstance that the gift was to the debtor. It was, in this respect, something like the case of *Drury* v. *Smith*, 1 P. Wms. 404. The distinctions which the Vice-Chancellor takes in his judgment show, I think, that he would not have held the delivery to a third person of a receipt for money a donation to such person of the debt acknowledged in it.

So long ago as 1710, exchequer tallies were held by the Master of the Rolls in *Jones* v. *Selby*, Prec. in Ch. 300, to be proper subjects of a *donatio mortis causa*. Lord Cowper, however, reversed his decision, though, on a view of the case, not necessarily inconsistent on this point. In *Ward* v. *Turner*, 2 Ves. 431, Lord Hardwicke held that receipts for South Sea annuities were not capable of being made the subject of such a gift. That was a very carefully considered decision. South Sea annuities were, like the savings' banks, the subject of State regulations. The receipts were given by the managers to parties on their making payment. Subsequent authorities refer to *Ward* v. *Turner* as one by which future judges ought to regulate their decisions, and as laying down that rules in favor of such gifts ought not to be extended.

I do not quite go with the inference drawn from Lord Romilly's observation in *Hewitt* v. *Kaye*, L. R. 6 Eq. 200, where he speaks of an I. O. U. as in the same class as a promissory note. Such a document is not a security for money in the sense in which a bond or a bill or a note is. It is merely evidence of a debt.

But the case most strongly in favor of the petitioner's claim here is *Amis* v. *Witt*, 33 Beav. 619; 1 B. & Sm. 109, where it was held that a deposit note of a bank could be made the subject of a *donatio mortis causa*. The form of the document does not appear from the report; it may have contained something special. At all events it was one which should have been given up on payment. The judgment in the case at law seems to have gone almost entirely on the policy of insurance, which was a special contract by the insurance company. Both reports, that in the Queen's Bench and in Beavan, are unsatisfactory.

In *Hewitt* v. *Kaye*, L. R. 6 Eq. 275, it was held by Lord Romilly — the same judge who decided *Veal* v. *Veal* — that a cheque of the donor could not be made the subject of a *donatio mortis causa*. The ground of the decision is that a cheque is a mere order for payment of money, which may be revoked by death, and not a contract creating liability. In *Boutts* v. *Ellis*, 4 D. M. & G. 249, and in *Bromley* v. *Brunton*, L. R. 6 Eq. 275, the amount of the cheque was paid, or ought to have been paid (the cheque being presented, and there being assets in the bank to meet it), in the donor's lifetime. In *Lawson* v. *Lawson*, 1 P. Wms. 441, the gift of the goldsmith's note was held good, not as a *donatio mortis causa*, but as an appointment of the money. The decision went on the peculiar form of the instrument, which was to the donor's wife to buy mourning.

Assuming these cases to have been all well decided, none of them warrant the proposition contended for before me. To extend the doctrine to a bank-book would be going very much further. I do not find in the Acts[1] relating to savings' banks anything to distinguish a savings' bank pass-book from an ordinary banker's pass-book; and were I to decide that the book in this case is a proper subject of a *donatio mortis causa*, I do not see how I could stop short of holding not only that a bank-book but that any pass-book might be made the subject of such a gift. The book of this savings' bank is rather more unfavorable to the claimant's case than a common bank-book would be; for by the rules printed in it, it appears that payment will be made only to the depositor himself, or on his power of attorney during his life; and after his death smaller sums are payable, as specified by the rules; but if the deposit exceeds £50, it can only be paid on production of probate or letters of administration; the book is required to be produced, and checked with the bank ledger, and the bank is protected against personation if it be lost. But the book does not embody the terms of the contract between the depositor and the bank; the only entries to be found in it are figures or sums of money written in full, in a column for that purpose,

[1] Stat. 26 & 27 Vict. c. 87, §§ 6, 41, 52, 53.

to prevent fraud. Consistently with the theory that an actual and not a merely symbolical delivery is required, handing over a written contract must be a delivery of the thing given; and the right to assistance in enforcing the money due on it follows. A contract embodied in a writing is in a sense capable of being given; only one person can have it. But it would be going beyond any case yet decided, to hold that what is merely evidence of, or a voucher for, the debt — of which there may be several — is capable of being thus dealt with.

I am therefore of opinion — both on the question of fact, and the question of law — that the petitioner has failed to establish the gift.

PENNINGTON *v.* GITTINGS.

COURT OF APPEALS OF MARYLAND. 1830.

[*Reported* 2 *G. & J.* 208.]

BUCHANAN, C. J., delivered the opinion of the court.[1]

The bill was filed to compel the defendant, the executor of James Gittings, to transfer to the original complainant, Ann Patterson, daughter of the testator, seventy-five shares of stock, of the Commercial and Farmers' Bank of Baltimore; a certificate of which, it alleges, was given and delivered to her by the testator, who, it is stated, indorsed his name on the back of the certificate in her presence, and at the same time informed her that he gave her the stock.

The answer admits the name of the testator, indorsed upon the certificate to be in his handwriting, but denies that he gave or intended to give the certificate of stock to Ann Patterson, as alleged, and puts the complainant on proof of the allegation; and denies also the delivery of the certificate as stated. . . . Under the view, however, that we had taken of the case, it is not necessary to examine whether the allegations in the bill have been sufficiently established or not, by the proof in the cause. For supposing them to be fully proved, it does not appear to us that the object of the bill can be gratified. The alleged gift seems to have been intended as a *donatio inter vivos;* but whether a *donatio inter vivos*, or *donatio mortis causa*, makes no difference. Such a gift cannot be by mere parol. The rule of law in either case is, that a *delivery* of the *thing* intended to be given, is essential to the perfection of the gift. This is admitted; indeed it cannot be denied. As to donations *inter vivos*, it has never been doubted, that delivery of the thing intended to be given is indispensable; and the same principle is now equally well settled in relation to donations *mortis causa*. The delivery must be according to the manner in which the particular thing is susceptible of being delivered; and that which is not capable of

[1] The opinion alone, and part only of that, is given.

being delivered is not the subject of a donation. There must be a parting by the donor with the legal power and dominion over it. If he retains the dominion, if there remains to him a *locus penitentiæ* (which must be the case, when he retains the possession, and what is done, is merely by parol), there cannot be a perfect and legal donation, and that which is not a good and valid gift in law, cannot be made good in equity.

Proceeding upon this principle, the relief sought in *Mary Tate* v. *Hilbert*, and *Jane Tate* v. *Hilbert*, 2d Vesey, Jr. 112, was refused where a man, a short time before his death, gave one a cheque on his banker, which was not presented before his death, and to the other a promissory note, both of them being his relations. They were strong cases, particularly that of the cheque, which, if it had been presented before the death of the deceased, would have been paid, the banker having sufficient funds in his hands.

But the money, the thing that was intended to be given, not having been delivered, they were not good and available donations in law; the promissory note and the cheque being only evidences of contract, they did not transfer the possession of the money, nor invest the persons to whom they were respectively given, with the legal dominion over it, which continued in the deceased until his death, when the property vested in the executors. A promissory note delivered as a donation, is not a vested gift of the money, but only a promise or engagement to give; and imposes no stronger obligations, nor affords a better ground of action, than a promise to deliver any chattel as a gift. Such intended donations cannot be enforced on the consideration of blood, which has been insisted on in this case, and was probably a leading motive with the defendant's testator; in the cases referred to, in 2d Vesey, Jr. 112, Mary Tate and Jane Tate being stated to have been his relations.

The consideration of natural love and affection is sufficient in a deed; but a mere executory contract, that requires a consideration, as a promissory note, cannot be supported on the consideration of blood, or natural love and affection, there must be something more; a valuable consideration, or it is not good and cannot be enforced at law, but may be broken at the will of the party. And being void at law for want of a sufficient consideration, Chancery cannot sustain and enforce it. The cases of *Mary Tate* and *Jane Tate* v. *Hilbert*, have been mentioned as striking cases, in which the Lord Chancellor manifested a strong desire, more than once expressed, to grant the relief prayed; a desire not foreign from us, so far as sitting here we are permitted to entertain it, but we are, as he then was, restrained by the settled and stubborn rules of law. The case of *Ward* v. *Turner*, 2d Vesey, Sen. 431, is just this case. It was a bill to compel a transfer of South Sea annuities, the receipt for which had been delivered to the complainant's testator by one Flog, saying, "I give you, Mosely, these papers, which are receipts for South Sea annuities, and will serve you after I am

dead." It was argued for the complainant that the delivery of these receipts, with the strong words of gift accompanying it, was as much as could be done towards giving the annuities, except a mere transfer in the books. But it was held that the annuities being the thing intended to be given, a delivery of the annuities was indispensably necessary to make it a good donation; that the delivery of the receipts was not sufficient, and that such a donation could not be made without a transfer, or something equivalent, that being the only mode in which stock or annuities are susceptible of being delivered.

It is supposed that this case differs from that, because, as is alleged, that James Gittings, at the time of delivering the certificate of stock to his daughter, indorsed his name upon the back of it (which does not appear to have been done by Flog, when he delivered the receipts for the annuities) which, it is contended, gave her authority to write over it a full assignment or a power of attorney, which would have enabled her to go to the bank, and cause a transfer of the stock to be made to her on the books. But it is not perceived that this makes any difference, nor is it necessary to inquire whether that indorsement gave any such authority; if it did, it never was executed. It appears upon the face of the certificate itself that the stock was transferable at the bank only, and it is admitted that the indorsement, whether in blank or in full, did not, and could not, operate to transfer the stock; and as it was the stock and not the certificate, that was the subject of the intended gift, it matters not whether the indorsement was in full or in blank; for, as in the case of the cheque on the banker, which not being presented and paid in the life-time of the maker, the intended donation of the money was defeated for want of delivery, notwithstanding the holder of the cheque might, by presenting it in the life-time of the maker, have obtained the money, and thus perfected the gift; so here, even if by the indorsement of the certificate, whether filled up or remaining in blank, Mrs. Patterson might have gone to the bank in the life-time of her father, and caused a transfer of the stock to herself on the books of the bank, the only way in which the stock, the thing that was intended to be given, could be delivered, and thus have perfected the donation; yet, not having done so, it was not a valid gift of the stock, either in law or equity, for want of delivery. It was not a valid gift in law, otherwise there would have been no necessity for going into Chancery to perfect it. And being void in law, Chancery cannot interpose to make it good or enforce it. If Mr. Gittings was alive, it could not be seriously contended, that he could be compelled to transfer the stock in the absence of any consideration; and the same principle applies to his executor. His death does not make that good, which was bad before. *Decree affirmed, with costs.*

Winchester and *Mayer*, for the appellant.

Taney (Attorney-General) and *U. S. Heath*, for the appellee.

HEADLEY *v.* KIRBY.

SUPREME COURT OF PENNSYLVANIA. 1852.

[*Reported* 18 *Pa.* 326.]

ERROR to the District Court, Philadelphia.

This was an action of replevin by Headley, as administratrix of the estate of Patience Kirby, deceased, against Ann Kirby, to recover from her the possession of a variety of clothing, a watch and chain, pencil-case, teaspoons, trunks, a promissory note for $1600, a book of deposit in the Philadelphia Savings Fund Society, and articles of female wearing apparel, which had belonged to the deceased. They were claimed by the defendant as a gift from the decedent, as a *donatio causa mortis.*

The defendant was a sister-in-law of the decedent, who left brothers and sisters, of whom the plaintiff was one. The decedent went to the house of defendant on the 23d October, 1850, taking all her property with her, and rented a room in the house. Some of the articles were contained in two trunks; others were in a band-box, and others were hanging up in a closet in the room. The decedent died on 26th October, 1850.

Three witnesses testified as to the alleged donation. One witness said the words of the decedent were: "Ann, I am dying; all that I have is here, and all is yours; do everything for me; there are my keys, take them." Another witness testified substantially the same. A third witness testified that the words were: "Ann, I am dying; all that is here with you is yours; do the best for me when I am gone; there 's the keys." It was argued that the last expression *excluded* the money in the Saving Fund. The decedent died a few minutes after the alleged donation.

The judge charged, *inter alia*, that if the facts related by the defendant's witnesses were believed by the jury, they were sufficient to establish a valid *donatio causa mortis;* and he submitted to the jury the question whether the decedent used "words sufficient to declare *her intention to give all her property to the defendant;* and, if so, did she do so under the immediate expectation of death. If so, the gift was valid as a *donatio causa mortis.*"

This part of the charge, and other parts of the answers to points or instructions of the court, were assigned as error.

Sheppard and *Meredith*, for plaintiff in error.

Brightly, for defendant.

The opinion of the court was delivered by

LOWRIE, J. Though we derive the law as to *donationes mortis causa* from the Roman law, yet their rules on that subject are no guide to us in the administration of our law; for the stringent severity of their law of wills occasioned and excused much larger equitable excep-

tions, by way of gifts in prospect of death, than can at all be sanctioned under our much more reasonable Statute of Wills. But even with them these gifts were so carefully guarded that, however they might impinge upon the rules as to testamentary dispositions, they could not readily give rise to fraud; for every such gift was invalid unless proved by five witnesses present at the time, every one of whom was required to be a Roman citizen, of full age, of good character, and not related to either donor or donee, a regulation not belonging to our law of evidence.

In the Roman law (Inst. 2, 7, 1; 2 Domat, 4, 1, 3, 2–6), as well as in ours (2 Ves. Jr. 120; 2 Swanst. 98), these donations are regarded as of the same nature as testamentary dispositions, and such is manifestly their character. We shall therefore take but a one-sided view of such gifts, if, in considering them, we neglect the spirit of our law of wills; and it is not necessary here to point out the care which some courts have taken to prevent this exception to the law of wills from making any further invasions upon that law.

So far as regards property, a will is the declaration of one's intention as to the disposition of it after his death; and our law on that subject is very clear in defining the form of such a will. Considering that our present Statute is substantially a mere republication of the law as it has existed ever since 29 Charles 2, it is perhaps too late to attempt without legislative direction to reclaim it from the exceptions which have been made in favor of these donations; but we may and must restrain the effect of those exceptions, so as to prevent them from becoming themselves a general rule.

The gift in the case before us professes to embrace all the donor's property, and to be made in prospect of death, and is therefore a will, if it receive the sanction of law. The claim that such a thing can be is a startling consequence of the exceptions in favor of *donationes mortis causa*, and it is not possible to say that such a consequence may not be arrived at, if we follow the analogies of these exceptions, without looking at our Statute, and without regarding the maxim, *quod contra rationem juris receptum est, non est producendum ad consequentia.*

This case is so entirely peculiar in its character, that, if we take our Statute of Wills as the general rule for such dispositions, as we are bound to do, and treat the cases of *donationes mortis causa* as exceptions which are not to be extended by way of analogy, then we are clear of all embarrassment as to the principle on which the case is to be decided. It is not pretended that any gift like this has ever been held good, and it may be safely declared, that no mere gift made in prospect of death and professing to pass all one's property to another, to take effect after death, can be valid under our Statute of Wills, no matter what delivery may have accompanied it. If this is not true, then it is plain that the Statute of Wills, so far as it is intended to exclude all modes of disposing of personal property at death which it does not provide for, is repealed by the decisions of the courts.

It is not necessary to point out the danger of sustaining such a donation as this, for no thinking mind can fail to see it, and it was this very consideration that led to the precautions which are provided in the Statute on the subject of nuncupative wills. We cannot even glance at these precautions without seeing that they were designed to defeat a gift sustained by such evidence as was given in this case, and to prevent oral dispositions in the nature of last wills from being made under such suspicious circumstances. The court below ought to have instructed the jury that such evidence could not establish a *donatio mortis causa*, or to have ruled out the whole evidence as insufficient.

Judgment reversed, and new trial awarded.[1]

[1] Contra, *Meach* v. *Meach*, 24 Vt. 591 (1852), the opinion in which was delivered by REDFIELD, C. J. In a note to the case the learned Chief Justice says: "One cannot but feel that it was never properly intended to apply to a general disposition of a large estate to the utter subversion of the Statute of Wills. And still, when we attempt to limit its operation, we encounter embarrassments not readily disposed of. If one may remit a debt of £500, about $2,500, by the simple act of delivering the receipt for it to a third person, a servant attending the death-bed, with a general expression of desire, in the briefest words, that the debt should be cancelled, which was the case of *Moore* v. *Darton*, 7 Eng. Law and Equity R. 134, and which was sustained without difficulty by a distinguished English Vice-Chancellor, we can scarcely be expected to say that twice that amount, therefore, is not a good donation *mortis causa*. And although, in practice with us, this mode of final disposition of property has oftener been confined to some favorite articles of personal attire, or ornament perhaps, like watches and jewels, yet an examination of the cases will show a wonderful variety in the character and extent of property disposed of in this mode, often including all one possesses, consisting of the largest extent and variety of property, both in possession and in action; and thus, in fact, amounting to a nuncupative will. And still I find no case, except the late case in Pennsylvania, where any attempt has been made to limit its operation, on account of the comparative or absolute extent of the property disposed of. And the more I have reflected upon the subject and compared the cases, with a view to evolve some rational and practicable principle of limitation to the extent of its operation, the more I have felt constrained to declare that it cannot be done by any powers of abstraction or generalization, which my short sight is able to command.

"If the servant, whose whole estate consists of a few hundred dollars, balance of earnings, in the hands of his employer, and five pieces of property, in possession, is to be allowed, in his last sickness, to dispose of it to five different persons by mere words, and by committing the entire evidence of debt to a fellow servant, which seems now to come within all the best considered cases upon that subject, it would seem invidious to hold, that when the property amounts to thousands, composing the principal estate of a substantial householder, that therefore it could not be conveyed in this mode. And if the man of great worldly possessions, who has executed his will in the most reverent formality, may, when death presses him sore, modify that disposition, which alone the written law of the land recognizes, by taking from his secret drawer securities for debt to the amount of thousands of dollars, and making an irrevocable disposition of them after death, by the brief words "I give," and the simple act of delivery to the wife, which, in law, is a delivery to himself, a mere change from one hand to the other, it would certainly not be easy to say that one whose whole property did not amount to one tithe of that sum, or if it did exceed it by hundreds of dollars, could not do the same. And yet it will be noticed, that the last case supposed is the well considered and constantly recognized case of *Miller* v. *Miller*, 3 P. Wms. R. 356."

MICHENER *v.* DALE.

SUPREME COURT OF PENNSYLVANIA. 1854.

[*Reported* 23 *Pa.* 59.]

ERROR to the District Court, Philadelphia.

This was an action of assumpsit by Samuel E. Dale and Elizabeth Jane Dale against John G. Michener, to recover the value of $109\frac{1}{4}$ ounces of gold dust, and some coin, the latter amounting to about $22.60.

The plaintiffs claimed by virtue of an alleged *donatio causa mortis*, made by their brother James E. Dale, who died on board the steamer Panama, at sea, in the Pacific Ocean, in August, 1850. He had been a sailor, but leaving that employment he went to California and worked as a miner. He died on his voyage from San Francisco to Panama. Immediately before his death, he had in his possession the gold dust and coin. These were afterwards delivered to the consul at Panama, by whom the gold dust was converted into money, and remittance made to Michener, the defendant, who, at the instance of the father of Dale, had received letters of administration, at Philadelphia, on the estate of the deceased. The amount received was claimed by the plaintiffs, who were the brother and sister of the decedent.

It was said that the gold dust and coin were the whole estate of Dale except his clothing, at the time of his death.

On the trial, it appeared from the deposition of M. Lent, the purser of the steamer Panama, that James E. Dale, about six hours before his death, sent for Lent to see him. Lent went to him. He was in the steerage of the boat, with a man who appeared to be a sailor, also a steerage passenger. Dale was sick with cholera, and the man was attending to him. Dale had in his hands, loose, some coin, and a bag of gold dust tied up. He told the sailor to give the bag and coin to Lent, which he did. "In answer to questions put to him by" Lent, "he said his name was James E. Dale; that he was twenty-six years of age; that he was not married." Lent "asked him, *who he wanted to have his effects?* He said, *his sister and brother.*" Lent "asked him where they lived? he replied, in Philadelphia; *and that was all he said.*" In answer to subsequent interrogatories, he said, "the gold dust and coin was given to me in the presence of James E. Dale, and at his request, and *he wished his brother and sister to have it;*" and "James E. Dale did not inform me that he had any property, otherwise than by directing the sailor to deliver to me the bag of gold dust and coin, and by saying, *that he wished it to go to his brother and sister.*"

By the same deposition it appeared that Dale died about six hours after the said conversation, of the cholera, with which he was then suffering.

It was also testified by a witness that *he* gave to the said James E. Dale about fourteen ounces of gold dust, to bring to the witness's family in Philadelphia. It appeared that a suit had been brought against the defendant as administrator, for the value of the said 14½ ounces of gold dust.

On the part of the defendant points were submitted.

The judge, *inter alia*, charged that if the jury found that Dale was dangerously ill, and believed he was about to die, and then expressed his desire that the gold dust and coin should become the property of his brother and sister in the event of his death, and that the same was delivered to Lent to be delivered by him to them, and that his intention was that this property and no more should be given to his brother and sister; and that Dale died within a few hours after, of the sickness with which he was then suffering, in such event the plaintiff could recover the amount received by the defendant.

But, that, if the jury found that when the gold dust and coin were put into the hands of Lent, by direction of Dale, the intention of the latter was, that all his effects whatever they might be, and not merely the gold dust and coin, should become the property of the plaintiffs, then the verdict should be for the defendant.

The *third* point submitted was, that if the proceeds of the gold dust received by the defendant was *the whole* of Dale's estate, he could not dispose of it by a gift which would take effect as a *donatio causa mortis*. As to this point, the judge charged that it was correct, but that he reserved the point.

Verdict was rendered for the plaintiffs.

A number of specifications of error was made; the first three were to the admission of the testimony of Lent; the fourth was to the charge; the fifth was to leaving it to the jury to determine the meaning of the words used by Dale, which were alleged to constitute the *donatio causa mortis*. 6. In leaving it to the jury to determine his *intention*. 7. That if the plaintiffs were entitled to the proceeds of the gold dust, their remedy was *several* and not joint. 8. That the evidence was not sufficient to establish a *donatio causa mortis*. 9. That if the gold dust was the *principal part* of Dale's property, he could not dispose of it in the manner in question. 10. That a *donatio causa mortis* is subject to the debts of the deceased; and if it be necessary to pay the debts, the administrator was entitled to retain the proceeds for that purpose. 11. That being liable for debts, the administrator is entitled to retain it until all claims are ascertained and settled. 12. If there was in this case, a gift of the gold dust, the remedy of the plaintiffs was for the balance after settlement of the administrator's accounts. 13. That the plaintiffs could not recover in this action. 14. In reserving the third point charged upon. It was intimated in the argument that from the point being reserved the jury might have considered it doubtful.

T. S. Smith, for plaintiff in error.

Thayer, for defendants in error.

WOODWARD, J. James E. Dale, a native of Philadelphia, and a bachelor, having lived several years in California, embarked at San Francisco in the month of August, 1850, for Panama, on board a steamship. On the voyage, between Acapulco and Panama, he was seized by cholera. He sent for the purser of the ship, Mortimer Lent, who when he came found Dale lying dangerously ill, on the steerage deck. A sailor was in attendance upon him. The sick man held in his hands a buckskin bag of gold dust, and some pieces of coin, together amounting in value to $1770.60, which he handed to the sailor, and requested him to deliver them to Mr. Lent, which was done on the spot. In answer to questions put to him by Lent, he said his name was James E. Dale; that he was twenty-six years old; that he was not married. Lent asked him who he wanted to have his effects? He said his sister and brother, residing in Philadelphia. This, says Lent, was all he said; but on further examination, the witness stated, "the said gold dust and coin were given to me in presence of said James E. Dale, and at his request; and he wished his brother and sister to have it." About six hours after this occurrence Dale died of the disease from which he was then suffering.

This is an action brought by his brother and sister, to recover the value of the gold dust and coin, after conversion, from the administrator, into whose hands it has come. The question is, whether these circumstances establish a *donatio causa mortis*.

The plaintiff in error, who was defendant below, founds an argument on the word "effects;" that it was a nuncupative disposition of his whole estate, and not a mere gift of the gold dust and coin. This question was properly submitted to the jury, and they found that the words of donation had reference only to the gold dust and coin. And interpreting the words of the dying man by his action, there is no room to doubt that the *effects* which he meant to give to his brother and sister were what he handed to the sailor.

Though we have derived the name and some of the principles of such gifts from the Roman law, yet we treat them with less favor than they enjoy in that system of jurisprudence, because it is the policy of our law to require all testamentary dispositions to be in writing. Our Statute of Wills does indeed provide for nuncupation in respect to personal property, but surrounds it with so many requisites and restrictions (all which we hold to be indispensable, *Haus* v. *Palmer*, 1 Am. L. R. 635) (9 Harris 296), that it is scarcely more than a nominal exception to the general rule that testaments must be written. And I agree it is a fair principle of decision, as suggested in *Headley* v. *Kirby*, 6 Harris 329, that we take our Statute of Wills as a general rule, and treat *donationes mortis causa* as exceptions which are not to be extended by way of analogy. It results, thence, that nothing can be sustained by way of *donatio causa mortis*, that is not strictly and purely such.

Donatio causa mortis is a gift of a chattel made by a person in his last illness, or in *periculo mortis*, subject to the implied condi-

tions that if the donor recover, or if the donee die first, the gift shall be void.

In this definition I have followed, substantially, C. J. Tilghman in *Wells* v. *Tucker*, 3 Bin. 370, and the English cases collected in 6 Bac. Abridg. 162; but I am aware that in *Nicholas* v. *Adams*, 2 Wh. 22, it was criticised by C. J. Gibson, who quoted from Justinian's Institutes to prove that there was nothing about *sickness* in the primitive definition, and to deduce what he considered the proper definition — a conditional gift dependent on the contingency of expected death.

I am far from thinking definitions unimportant, for, in the law as in all other sciences, they are the very keys to accurate knowledge; but the difference between these definitions is not material as applied to the case before us, for, according to either or both of them, a good *donatio causa mortis* was made by Mr. Dale. It was a gift in his last sickness, and in view of expected death; and the donees surviving him, the implied conditions were taken away and the gift became absolute. Delivery was indispensable, but whether made to the donee immediately, or to another for him, was held to be immaterial in *Drux* v. *Smith*, 1 P. Wms. 404. The delivery to Lent was all that the law required.

And it was the completeness of this delivery in execution of the gift, which excluded the rights of the administrator. A gift is an executed contract. It may be defeated by conditions subsequent; but it must vest presently or it is nothing, for a mere promise to give cannot be enforced either at law or in equity. When a chattel has been given *causa mortis*, possession delivered, and death has performed the condition subsequent on which it depended, no title whatever in that chattel descends to the executor or administrator, and he has no right to the possession of it for purposes of administration. If the title of the donor be so effectually divested by a gift *causa mortis* that he cannot affect it by his subsequent will, as was held in *Nicholas* v. *Adams*, 2 Wh. 23, then, beyond controversy, his personal representative can take no interest in it. The donee, it is true, must account for the value of the chattel, if creditors appear and there be not estate enough beside to satisfy them, for in no manner whatever can a man, living or dying, give away his estate in fraud of creditors. The law compels him to be just, before it permits him to be generous. But until the donation is needed to satisfy creditors, the donee is entitled to enjoy it, and it is not subject to the ordinary course of administration: *Roper on Legacies*, p. 3; *Tate* v. *Hilbert*, 2 Vesey, Jr. 120; *Walter* v. *Hodge*, 2 Swans. 98.

It was greatly insisted on in argument that the court ought to have instructed the jury that if the gold was the *principal* part of Mr. Dale's property, he could not make a *donatio causa mortis* of it, and for this *Headley* v. *Kirby* was relied on. In that case there was a variety of chattels — they were not specified by the donor — nothing more than a constructive delivery occurred — the language was evidently testamentary — and it referred expressly to all her property. In these particu-

lars the case is broadly distinguished from the present, and it does not decide that where a single chattel is the whole of a man's estate, or the "principal part of his property," it may not be given *causa mortis*. The doctrine of that case, predicated of the circumstances then before the court, is not to be questioned, for it rests on sound reasons; but, if applied to a case like this, it would defeat all gifts made as memorials of gratitude and affection in the most solemn circumstances of life. It is due to the sensibilities of our nature that the law permit, under proper limitations, such expressions of a dying man's regards. Many a chattel of small intrinsic worth has been thus impressed with an unspeakable value, which it would be a sort of sacrilege to subject to inventory, appraisement, and sale in open market. The court did not charge that a man could dispose of his whole estate as a gift *causa mortis;* and if the gold dust and coin were the principal part of the decedent's property, we see nothing on the record to impeach it as a *donatio causa mortis*.

The property having been converted, and its equivalent only being in the hands of the administrator, the action was well brought in assumpsit; and because the title of the plaintiffs was joint, the implied promise followed it, and they were properly joined to sue upon it.

Though the fourteen errors assigned have not been discussed in order, it is believed the substance of all of them has been disposed of in these observations, and the judgment is affirmed.

GRYMES *v.* HONE.

COURT OF APPEALS OF NEW YORK. 1872.

[*Reported* 49 *N. Y.* 17.]

PECKHAM, J.[1] On the 19th August, 1867, the alleged donor being the owner of 120 shares of stock, included in one certificate, in the Bank of Commerce of New York city, made an absolute assignment in writing, transferable on the books of the bank on the surrender of the certificate, under seal and witnessed, of twenty shares thereof to this plaintiff, his favorite granddaughter, for value received, as the assignment purports, and appointed her his attorney irrevocable to sell and transfer the same to her use. After this paper had been signed, "he kept it by him for a while" (how long, nowhere appears), and afterward handed it to his wife to put with the will and other papers in a tin box she had. When he gave to his wife the paper so drawn, he said: "I intend this for Nelly. If I die, don't give this to the executors; it is n't for them, but for Nelly; give it to her, herself." She asked, "Why not give it to her now?" "Well," he said, "better keep it for the present; I don't know how much longer I may last or what may happen, or whether we may not need it." This is the state-

[1] The opinion only is given.

ment, as given by the widow of donor. It was admitted that, at the time of executing said instrument, the donor was from seventy-eight to eighty years of age, was in failing health, and so continued till his death, January 23d, 1868. Upon these facts was there a valid gift *mortis causa?*

Upon the question as to what constitutes such a gift, the authorities are infinite, not always consistent. But at this time it is generally agreed that, to constitute such a gift, it must be made with a view to the donor's death from present illness or from external and apprehended peril. It is not necessary that the donor should be *in extremis*, but he should die of that ailment. If he recover from the illness or survive the peril, the gift thereby becomes void; and until death it is subject to his personal revocation. 2 Kent, 444, and cases cited; 2 Redfield on Wills, 299 *et seq.;* 1 Story's Eq., § 606, etc., notes and authorities.

In the next place there must be a delivery of it to the donee or to some person for him, and the gift becomes perfected by the death of the donor.

Three things are necessary. 1. It must be made with a view to donor's death. 2. The donor must die of that ailment or peril. 3. There must be a delivery. The appellant insists that the gift in this case fulfils neither requisition.

Was this gift made with a view to the donor's death? It is so found by the referee as a question of fact. What the witness intended to convey by the term "failing health" is not clear; but intendments are against the appellant where the fact is left uncertain. There is nothing in the case inconsistent with the idea that the testator, when he signed this assignment, was confined to his bed, and so continued till his death; though I do not wish to be understood as saying that such confinement was necessary to validate the gift. It seems that he died, as the referee finds, from this failing health, in five months thereafter; so that the terms, as used, indicated a very serious ailment.

True, he did not, and of course could not, know when death would occur when he executed this assignment, but he was in apprehension of it. His age and his "failing" told him death was near, but when it might occur he had no clear conviction. An ailment at such an age is extremely admonitory.

From these facts, can this court say, as matter of law, that this testator was not so seriously ill when he executed this assignment as to be apprehensive of death; that he was not legally acting "in view" of death; that he was not so ill as to be permitted to make this sort of gift? True, the donor died five months thereafter; but we are referred to no case or principle that limits the time within which the donor must die to make such a gift valid. The only rule is that he must not recover from that illness. If he do, the gift is avoided. The authorities cited by the appellant's counsel, of *Weston* v. *Hight*, 5 Shep. Me. 287, and *Staniland* v. *Willott*, 3 McN. & Gor. Ch. R. 664, are both instances of

recovery, and the gifts, on that ground, declared void. In the latter, the donor and his committee recovered back the stocks given, because of his recovery. The first case is improperly quoted in 2 Red. 300, note 11, as not originally authorizing the gift.

The declaration of the donor, that his wife should keep the assignment and not hand it over till after his death, as he did not know what might happen, nor but that they might need it, was simply a statement of the law, as to such a gift, whether the declaration was or was not made. Clearly he could not tell whether he should die or recover from that ailment. If he did recover, the law holds the gift void.

The transaction as to such a gift is, the donor says, I am ill, and fear I shall die of this illness; wherefore I wish you to take these things and hand them to my granddaughter after my death; but do not hand them to her now, as I may recover and need them. A good *donatio mortis causa* always implies all this. If delivered absolutely to the donee in person, the law holds it void in case the donor recovers, and he may then reclaim it. *Staniland* v. *Willott*, supra.

To make a valid gift *mortis causa*, it is not necessary that there should be any express qualification in the transfer or the delivery. It may be found to be such a gift from the attending circumstances, though the written transfer and the delivery may be absolute. See the last case.

I think this donor made this gift "with a view to his death," within the meaning of the rule on that subject.

2d. This also settles the second requisite, as it is admitted that he did not recover, but died of this "failing health," as it is expressed.

3d. Was there a delivery? The assignment was delivered to his wife for the donee. She thus became the agent of the donor. So far as the mere delivery is concerned, this is sufficient. See the elementary writers before cited; also *Drury* v. *Smith*, 1 P. W. 404; *Sessions* v. *Moseley*, 4 Cush. 87; *Coutant* v. *Schuyler*, 1 Paige, 316; *Borneman* v. *Sidlinger*, 8 Shep. Me. 185; *Wells* v. *Tucker*, 3 Binn. 366; *Hunter* v. *Hunter*, 19 Barb. 631. Such a delivery to be given to the grantee after the grantor's death, is good as to a deed of real estate. *Hathaway* v. *Payne*, 34 N. Y. 92.

It is urged that this gift was not completed; that the stock was not transferred on the books of the bank, and could not be until the certificate held by the donor was surrendered, and that equity will not aid volunteers to perfect an imperfect gift.

Within the modern authorities this gift was valid, notwithstanding these objections. The donor, by this assignment and power, parted with all his interest in the stock assigned as between him and the donee, and the donee became the equitable owner thereof as against every person but a *bona fide* purchaser without notice. Delivery of the stock certificate without a transfer on the bank's books would have made no more than an equitable title as against the bank (*N. Y. and N. H. R. R. Co.* v. *Schuyler*, 34 N. Y. 80, and cases cited), though

it would give a legal title as against the assignor. *McNeil* v. *Tenth Nat. Bank*, 46 N. Y. 325, just decided, and according to the case of *Duffield* v. *Elwes*, 1 Bligh, N. S. 497, 530, decided in the House of Lords. The representatives of the donor were trustees for the donee by operation of law to make the gift effectual. See also to the same effect *Ex parte Pye*, 18 Ves. 140; *Kekewich* v. *Manning*, 1 De G. M. & G. 176; *Richardson* v. *Richardson*, 3 Eq. Ca. 686. This trust, like this species of gift, is peculiar. The trust, like the gift, is revocable during the donor's life, and is perfected and irrevocable by his death.

This extended the law as laid down by Lord Hardwicke, in *Ward* v. *Turner*, 2 Ves. Sr. 431, 442, upon this subject, and our courts have gone in the same direction with *Duffield* v. *Elwes*. Where notes payable to the donor's order and not indorsed, and other things of similar character, have been given *mortis causa*, courts compel the representatives of the donor to allow the donee to sue in their name, though the legal title has not passed. See last case; *Grover* v. *Grover*, 24 Pick. 261; *Chase* v. *Redding*, 13 Gray, 418; *Bates* v. *Kempton*, 7 Id. 382; and see also *Westerlo* v. *De Witt*, 36 N. Y. 340; *Walsh* v. *Sexton*, 55 Barb. 251.

The equitable title to this stock is thus passed by the assignment, and it was not necessary to hand over the certificate. A court of equity will compel the donor's representatives to produce the certificate, that the legal title to the stock may be perfected.

As there is great danger of fraud in this sort of gift, courts cannot be too cautious in requiring clear proof of the transaction. This has been the rule from the early days of the civil law (which required five witnesses to such a gift) down to the present time. In this case the proof of the assignment, etc., is entirely clear, the question being as to its effect. The judgment should be affirmed, with costs to be paid out of the estate.

All concur; ALLEN, J., not voting.

Judgment affirmed.

John H. Reynolds, for the appellant.
Orlando Meads, for the respondent.

McGRATH *v.* REYNOLDS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1875.

[*Reported* 116 *Mass.* 566.]

BILL IN EQUITY to obtain the instructions of the court as to the disposition of certain funds alleged to have been placed in the plaintiff's hands by Bernard Reynolds, as a *donatio causa mortis*. The case was

reserved by *Colt*, J., for the consideration of the full court, upon the bill and answers and a report, and appeared to be as follows:

Bernard Reynolds on September 23, 1873, sent for the plaintiff to come to him at Salem, where he was then lying very sick and in expectation of death. The plaintiff accordingly went to Salem and found Reynolds in bed in his room at the house of his sister, Ellen Gaffney, where he had been boarding for some three or four years. Reynolds then stated to the plaintiff that he had some money which he wished him to divide among his, Reynolds's, relations. The plaintiff, after some objection, took a piece of paper and wrote at Reynolds's direction as follows: "Salem, Sept. 23, 1873. I give to Patrick McGrath $5,758, to be divided as follows:" he then, also at Reynolds's direction, wrote the names of certain relatives of Reynolds, and then wrote against their names respectively certain sums of money. This paper Reynolds then signed and handed to McGrath. Reynolds then produced two savings bank books of the Emigrant Savings Bank of Boston, each showing a deposit of $900, and both in Reynolds's name, and requested McGrath to fill out the blank orders printed in the books for the payment to McGrath of the amounts deposited, which McGrath accordingly did. The orders were then signed by Reynolds, and the books and orders delivered by him to McGrath, in whose possession they have been up to the present time.

McGrath then, perceiving that the amount in the bank books fell short of $5,758 mentioned in the paper above referred to, asked Reynolds where the rest of the money was; Reynolds told him that it was in his trousers' pocket, turning, at the same time, in the bed and looking towards the closet in which the trousers were then hanging, and that Ellen would give it to him. There was then in the trousers' pocket the sum of $3,850. Ellen, his sister, was then present and heard the question and answer, and had previously been informed by Reynolds where the money was. McGrath then took the books to the bank for the purpose of drawing the money, but it being represented to him that he would lose some of the interest by drawing it at that time, he requested to have the amounts assigned to him. One of the officers of the bank informed him that this could not be done upon the orders produced, but drew a form of assignment, which McGrath sent to Reynolds. Reynolds signed and gave it to his sister, with directions to give it to McGrath, and this she did after Reynolds's death. Reynolds died the morning of September 27, 1873. In the evening of that day Ellen Gaffney took the money, amounting to $3,850, as above stated, from his trousers' pocket, and placed it in her own trunk, and about three weeks after Reynolds's death delivered it to McGrath.

The bank having declined to pay over any money after the death of Reynolds, McGrath was appointed administrator of Reynolds's estate, January 6, 1874. He had already paid over to two of the persons mentioned in the paper the sums set opposite their names, before he

had notice that the parties interested, or any of them, intended to raise any question as to the disposition of the funds intrusted to him.

Upon these facts the case was reserved for the consideration of the full court, such order or decree to be made as the nature of the case requires.

J. A. Gillis, in support of the gift.

S. B. Ives, J. R. and *C. W. Richardson*, contra.

WELLS, J. The writing signed by Reynolds cannot operate as a will, for want of attestation. The testamentary purpose, however, is so manifest, especially in connection with the attending circumstances and the declarations of Reynolds, as to forbid giving it effect as a transfer by way of gift *inter vivos*. It can be regarded only as an attempt to make a gift *mortis causa;* and it is so set forth in the bill.

As a gift *mortis causa*, it is not aided by the execution of the written instrument, except so far as that may contribute to greater certainty in the proofs. Such gifts cannot be effected by formal instruments of conveyance or assignment. They are manifested by, and take their effect from, delivery. They can therefore only be of such articles of personal property as are capable of transmission by delivery alone, so far at least as to confer a right or title which equity will protect and enforce. They require actual delivery or its equivalent. Symbolical or constructive delivery is not sufficient. *Parish* v. *Stone*, 14 Pick. 198, 203. *Sessions* v. *Moseley*, 4 Cush. 87, 92. *Rockwood* v. *Wiggin*, 16 Gray, 402. *Marshall* v. *Berry*, 13 Allen, 43. *Coleman* v. *Parker*, 114 Mass. 30. See also cases cited in 2 Redfield on Wills, 302 *et seq.*, and 1 Lead. Cas. in Eq., 583, notes to *Ward* v. *Turner*.

The greater part of the subject of the gift in this case was in money. There was no manual tradition of the money, and the occurrences at the time of the supposed gift do not furnish an equivalent for delivery. The donor informed the donee where it was, and that his sister, who was present, would give it to him. But there was no change of possession or control until after the death of the donor, when it was too late to make a delivery under the authority which the words of the donor would imply. Even if we regard the sister as the agent of the donee to receive and hold the money for the purposes of the intended gift to him, it does not relieve the difficulty; because she did not assume the possession and control of the money until after the decease of the donor. It does not follow because it was in her own house, where her brother was a boarder, that it was virtually in her possession at the time; and that inference is excluded by the fact that it was in a pocket in his personal clothing; and by the affirmative statement that she "had previously been informed by Reynolds where the money was."

We are forced to the conclusion, therefore, that there was a failure to make the intended gift effectual in law, by reason of an omission to perfect it by delivery of the money. As there was no intention to make the gift otherwise than as a whole, the failure of the principal part must defeat the whole. We cannot regard the delivery of the bank-books as

a delivery of part in the name of the whole so as to make the whole gift effectual. We need not consider the question whether the deposits in the savings banks would pass as *donatio causa mortis*, by delivery of the books with the order of payment or the assignments, if disconnected from the rest of the scheme. The intended gift was not of those deposits or books specifically, but of a definite larger fund; and the books were delivered merely as means in part to carry out the entire purpose. That purpose failing, there is no intended gift of which the delivery of those books is an appropriate manifestation.

The result is, that the plaintiff must hold the funds as administrator.

Instructions accordingly.[1]

PIERCE *v.* BOSTON SAVINGS BANK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1880.

[*Reported* 129 *Mass.* 425.]

THE first case[2] was an action of contract brought by Martin A. Munroe, in the name of the administrator of the estate of William Green, Jr., to recover deposits in the defendant bank made by Green to the amount of $600. Writ dated June 19, 1877. The bank defended the action at the request of the administrator. Trial in the Superior Court, without a jury, before *Gardner*, J., who allowed a bill of exceptions, in substance as follows: —

There was evidence tending to show that the intestate delivered the bank book, issued to him by the defendant, to Munroe, for his own use, as a *donatio mortis causa*, but there was no assignment of the bank book by Green. Upon making the first deposit, Green subscribed to the by-laws of the defendant bank. Printed on the outside of the bank book was the direction, "If you lose this book, give immediate information to the treasurer;" and inside, among the printed by-laws, were the following: "Art. 8. It shall be the duty of the treasurer to enter all deposits and payments made to depositors in the books of the bank, and a duplicate of such entry in the book of the depositor, which shall be his voucher and the evidence of the amount deposited." "Art. 9. No person shall receive any part of his principal or interest without producing the original book."

It appeared that the estate of Green, including said deposits, amounted to $1,242.87, and that the debts were $25.40, of which last sum $25 was for the services of the doctor during Green's last illness, and forty cents for some tobacco, both of which items had been paid,

[1] *Contra*, *Ellis* v. *Secor*, 31 Mich. 185 (1875); and see *Meach* v. *Meach*, 24 Vt. 591 (1852), and *Kenistons* v. *Sceva*, 54 N. H. 24 (1873); but the doctrine of *donatio mortis causa* has never been extended to real estate. *Meach* v. *Meach*, *ubi sup.*

[2] Two cases were reported together; only the first is here given.

and that the funeral and other expenses did not exceed $150, unless the alleged donee, Munroe, was to be considered a creditor. Munroe testified that he had a legal claim against Green's estate of $1,300, for board furnished, and some expenses paid for Green; and on January 20, 1879, he commenced a suit against the administrator to recover said amount, which suit is now pending. Pierce was appointed administrator of Green's estate on January 29, 1877, and the estate was represented insolvent in October, 1879, and commissioners were appointed by the Probate Court.

The defendant requested the judge to rule, as matter of law, as follows: "1. The delivery of the bank book to Munroe by the deceased in his last illness, even if made when he did not expect to recover, and if intended by the deceased as a *donatio mortis causa*, did not pass to Munroe any right to the deposit in the bank. 2. It appearing, from the testimony in the case, that the only property left by the deceased, including the bank deposit, amounted to $1,242.87, and that the deceased, at the time of the alleged gift, owed Munroe $1,300 in addition to debts to other persons; that the deceased was insolvent at the time of the alleged gift, and of his death, and the gift of the bank deposit, if good in other respects, as *donatio mortis causa* was void, because in fraud of creditors."

The judge declined so to rule, and found for the plaintiff for the amount of the deposits and the interest accumulated thereon, according to the terms of the deposits, down to the date of the writ, with simple interest at six per cent from the date of the writ, against the objection of the defendant, who contended that by the terms of the deposit the interest from the date of the writ should be, if anything, only at the rate of two per cent semi-annually, being the rate payable according to the terms of the contract of deposit.

To the above refusals to rule, and to the allowance of interest at six per cent from the date of the writ, the defendant alleged exceptions.

C. F. Kittredge, for the defendant.

F. Ames, for the plaintiff.

ENDICOTT, J. It has been repeatedly held that a deposit in a savings bank may be the subject of a valid *donatio causa mortis*, as well as of a gift *inter vivos*, and that such a gift may be proved by the delivery of the bank book to the donee, or to a third person for the donee, accompanied by an assignment. *Kingman* v. *Perkins*, 105 Mass. 111; *Foss* v. *Lowell Five Cents Savings Bank*, 111 Mass. 285; *Kimball* v. *Leland*, 110 Mass. 325; *Sheedy* v. *Roach*, 124 Mass. 472; *Davis* v. *Ney*, 125 Mass. 590.

As there can be no manual delivery of the credit which the donor has in the bank, the delivery of the book, which represents the deposit, and is the only evidence in the possession of the donor of his contract with the bank, together with an order or assignment, operates as a complete transfer of the existing fund, and is all the delivery of which the subject is capable.

We have not had the question presented to us until now, whether the delivery of the book, without a written assignment or order, is sufficient to constitute a valid gift *causa mortis* or *inter vivos*. The question has, however, been decided in other jurisdictions in the affirmative.

It was held in *Parish* v. *Stone*, 14 Pick. 198, that the donor's own note, payable to the donee, was not the subject of a *donatio causa mortis*. But it was intimated in the opinion, that a promissory note of another person payable to bearer, or indorsed in blank, so as to pass by delivery, might be a good gift *causa mortis*, and that a mortgage given to secure it would pass as an inseparable incident to the debt, though not assigned, citing *Duffield* v. *Elwes*, 1 Bligh N. R. 497; and *Duffield* v. *Hicks*, 1 Dow & Cl. 1. See also *Runyan* v. *Mersereau*, 11 Johns. 534; *Chase* v. *Redding*, 13 Gray, 418; *Ford* v. *Stuart*, 19 Johns. 342.

In *Grover* v. *Grover*, 24 Pick. 261, the action was by an administrator on a promissory note, which, as appears by the statement of facts, was secured by a mortgage. The note and mortgage were given by the plaintiff's intestate to one Blanchard, in contemplation of death, without assignment. It was held that there may be a valid gift *inter vivos* of a promissory note, payable to the order of the donor, without indorsement or other writing by him. And it was said by Mr. Justice Wilde, in delivering the opinion, after reviewing the earlier English cases, "In coming to this conclusion, we concur with the decision in the case of *Wright* v. *Wright*, 1 Cowen, 598, wherein it was held that the gift and delivery over of a promissory note, *mortis causa*, is valid in law, although the legal title did not pass by the assignment." See *Harris* v. *Clark*, 3 Comst. 93. It was also decided that Blanchard, on the death of the donor, could maintain an action against the maker of the note in the name of the administrator, without his assent. It was not necessary to decide whether the gift of the mortgage security was valid, as the right to maintain the action did not depend upon that question, though *Duffield* v. *Elwes* was referred to, as deciding that the gift of the debt operated as an equitable assignment of the mortgage.

In *Sessions* v. *Moseley*, 4 Cush. 87, it was said that "a note of hand of a third person, a security for money, or a chose in action, however it may have formerly been considered, is now held to be the proper subject of such a gift." And in *Bates* v. *Kempton*, 7 Gray, 382, it was decided, on the authority of these cases, that, by the law of Massachusetts, a negotiable note is the proper subject of such a gift without indorsement, and that the donee may maintain an action on it in the name of the administrator of the donor without his consent. See also *Borneman* v. *Sidlinger*, 15 Maine, 429. So the delivery of bonds, or a policy of life insurance with the deposit note, have been held to constitute good gifts *mortis causa* without assignment of the instruments. *Snelgrave* v. *Baily*, 3 Atk. 214, per Lord Hardwicke; *Witt* v. *Amis*, 1 B. & S. 109; *Wells* v. *Tucker*, 3 Binn. 366; *Waring* v. *Edmonds*, 11 Md. 424.

The decision of Lord Hardwicke in *Ward* v. *Turner*, 2 Ves. Sen. 431, in which he held that the mere delivery of receipts for South Sea annuities was not sufficient to constitute a good gift *causa mortis*, distinguishing it from the case of *Snelgrave* v. *Baily*, was said by Mr. Justice Wilde, in *Grover* v. *Grover*, to be technical and unsatisfactory, and to have no application to our laws, which place bonds and other securities on the same footing. In *Westerlo* v. *De Witt*, 36 N. Y. 340, the delivery of a certificate of deposit on the New York Life Insurance and Trust Company was held to be effectual, without a written assignment, to transfer the deposit itself to the donee as a *donatio causa mortis*. So a delivery to a donee of a savings-bank book containing entries of deposits to the credit of the donor, with the intent to give the donee the deposits represented by the book, has been held to constitute a complete gift of such deposits, and that such delivery vests the equitable title in the donee without assignment. *Hill* v. *Stevenson*, 63 Maine, 364; *Tillinghast* v. *Wheaton*, 8 R. I. 536; *Camp's Appeal*, 36 Conn. 88; *Penfield* v. *Thayer*, 2 E. D. Smith, 305.

A savings-bank book has a peculiar character. It is not a mere pass-book,[1] or the statement of an account; it is issued to the person in whose name the deposit is made, and with whom the bank has made its contract; it is his voucher, and the only security he has, as evidence of his debt. The bank is not obliged to pay to the depositor the money in its hands except upon presentation of the book; and if in good faith and without notice it pays the money deposited to the person who presents the book, although the book has been obtained fraudulently by him, the bank is not liable to the real depositor. *Sweeney* v. *Boston Five Cents Savings Bank*, 116 Mass. 384; *Wall* v. *Provident Inst. for Savings*, 3 Allen, 96; *Levy* v. *Franklin Savings Bank*, 117 Mass. 448; *Goldrick* v. *Bristol County Savings Bank*, 123 Mass. 320.

The book is the instrument by which alone the money can be obtained, and its possession is thus some evidence of title in the person presenting it at the bank. It is in the nature of a security for the payment of money; it discloses the existence and amount of the fund to the person receiving it, and affords him the means of obtaining possession of the same. We can have no doubt that a purchaser, to whom such a book is delivered without assignment, obtains an equitable title to the fund it represents; and a title by gift, when the claims of creditors do not affect its validity, stands on the same footing as a title by sale. *Grover* v. *Grover*, 24 Pick. 261.

In the first of the cases now before us, the delivery of the bank book to Munroe, by Green, in his last sickness, without a written assignment, made in contemplation of death, and with the intent thereby to transfer the deposit in the bank to Munroe, constituted a valid *donatio mortis causa*, and Munroe may maintain an action against the bank for the

[1] In *Ashbrook* v. *Ryon*, 2 Bush, 228 (1867), the delivery of a pass-book was held not to be a good gift *mortis causa*; the bank would seem not to have been a savings bank.

amount of the deposit, in the name of Green's administrator, without his consent.

The judge properly refused to rule, upon the facts presented, that the gift to Munroe made the estate insolvent, and was therefore void because in fraud of creditors.

It is true that a gift *mortis causa* cannot avail against creditors. In such case the donee is in the same position as legatees and heirs, for strictly speaking the only property which a person by gift *causa mortis* or by will can voluntarily dispose of, without consideration, is the balance left after the payment of his debts. Munroe therefore, as donee *causa mortis*, took his title to the bank deposit subject to the right of the administrator to reclaim it, if required for the payment of debts. *Mitchell* v. *Pease*, 7 Cush. 350; *Chase* v. *Redding*, 13 Gray, 418. But, upon the facts in this case, Munroe is the only person against whom, as creditor, the gift would be void, and it cannot be said to be a fraud as against him.

It appears that Pierce was appointed administrator in January 1877, and that the estate of Green, not including the deposits in the bank, amounted to $642.87. This action was brought in June 1877. In January 1879, Munroe brought an action against the administrator, alleging that Green's estate was indebted to him in the sum of $1,300, for board of Green and other expenses paid for him. Pierce thereupon represented the estate as insolvent in October 1879, and commissioners were appointed, but no further action seems to have been taken. The only debts besides the claim of Munroe amounted to $25 for the doctor's bill during Green's last sickness, and forty cents for some tobacco, which have both been paid. The funeral and other expenses did not exceed $150, but these are not debts within the meaning of the Statute in regard to the settlement of the estates of deceased persons. The expenses of the funeral, and of the last sickness, and the expenses attending the administration, we must presume to have been paid before the estate was declared insolvent. The doctor's bill would come within this category. Gen. Sts. *c.* 99, § 1. Munroe therefore was the only creditor. If he should establish his claim against the estate for $1,300, he would be entitled only to what remains of the $642.87 after the above payments, and could make no claim against the administrator for funds in his own hands, by virtue of the gift from Green. It would be an idle ceremony to have the bank deposit paid over to Pierce, the administrator, in order that he should deduct from it the claim of Munroe, pay him, and also return to him the balance.

As we understand the bill of exceptions, by the terms of the contract upon which the deposit was held by the defendant, the rate of interest thereon is four per cent *per annum*, payable semi-annually. This action is brought upon that contract, and the damages for the non-payment of the money are to be estimated at that rate, till the debt is merged in the judgment. *Brannon* v. *Hursell*, 112 Mass. 63; *Union Institution for Savings* v. *Boston*, 129 Mass. 82; *Miller* v. *Burroughs*,

4 Johns. Ch. 436; *Van Beuren* v. *Van Gaasbeek*, 4 Cowen, 496. The ruling of the presiding judge, that the plaintiff was entitled to six per cent from the date of the writ, was erroneous. If the plaintiff will remit the two per cent erroneously included in the verdict, the exceptions may be

Overruled.[1]

BASKET *v.* HASSELL.

SUPREME COURT OF THE UNITED STATES. 1882.

[*Reported* 107 *U. S.* 602.]

BILL in equity in the Circuit Court of the United States for the District of Indiana, by Hassell, administrator of the estate of Chaney, against Basket and the Evansville National Bank. The single question was whether a fund represented by a certificate of deposit for $23,514.70, issued by the bank to Chaney, belonged to Basket, who claimed it as a gift from Chaney, and had possession of the certificate. Basket asserted his title not only by answer, but by a cross-bill. It appeared that Chaney, being in possession of the certificate, during his last illness and in apprehension of death wrote on the back of the certificate this indorsement: —

Pay to Martin Basket, of Henderson, Ky.; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself. H. M. CHANEY.

The Circuit Court ordered that the certificate of deposit be surrendered to Hassell, and Basket appealed.[2]

Mr. Philip Phillips and *Mr. W. Hallett Phillips*, for the appellant.

Mr. Asa Iglehart and *Mr. J. E. Iglehart*, contra.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

[After stating the earlier decisions, the learned judge continued as follows:] The point, which is made clear by this review of the decisions on the subject, as to the nature and effect of a delivery of a chose in action, is, as we think, that the instrument or document must be the evidence of a subsisting obligation and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it, absolutely and irrevocably, in case of a gift *inter vivos*, but upon the recognized conditions subsequent, in case of a gift *mortis causa*; and that a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation, according to its

[1] So *Tillinghast* v. *Wheaton*, 8 R. I. 536 (1867); *Curtis* v. *Portland Savings Bank*, 77 Me. 151 (1885). But see *Walsh's Appeal*, 122 Pa. 177 (1888). Cf. *Conser* v. *Snowden*, 54 Md. 175.

[2] This short statement is substituted for that in the report.

terms, will not suffice. A delivery, in terms, which confers upon the donee power to control the fund only after the death of the donor, when by the instrument itself it is presently payable, is testamentary in character, and not good as a gift. Further illustrations and applications of the principle may be found in the following cases: *Powell* v. *Hellicar*, 26 Beav. 261; *Reddel* v. *Dobree*, 10 Sim. 244; *Farquharson* v. *Cave*, 2 Colly. C. C. 356; *Hatch* v. *Atkinson*, 56 Me. 324; *Bunn* v. *Markham*, 7 Taunt. 224; *Coleman* v. *Parker*, 114 Mass. 30; *Wing* v. *Merchant*, 57 Me. 383; *McWillie* v. *Van Vacter*, 35 Miss. 428; *Egerton* v. *Egerton*, 17 N. J. Eq. 419; *Michener* v. *Dale*, 23 Pa. St. 59.

The application of these principles to the circumstances of the present case requires the conclusion that the appellant acquired no title to the fund in controversy, by the indorsement and delivery of the certificate of deposit. The certificate was payable on demand; and it is unquestionable that a delivery of it to the donee, with an indorsement in blank, or a special indorsement to the donee, or without indorsement, would have transferred the whole title and interest of the donor in the fund represented by it, and might have been valid as a *donatio mortis causa*. That transaction would have enabled the donee to reduce the fund into actual possession, by enforcing payment according to the terms of the certificate. The donee might have forborne to do so, but that would not have affected his right. It cannot be said that obtaining payment in the lifetime of the donor would have been an unauthorized use of the instrument, inconsistent with the nature of the gift; for the gift is of the money, and of the certificate of deposit, merely as a means of obtaining it. And if the donee had drawn the money, upon the surrender of the certificate, and the gift had been subsequently revoked, either by the act of the donor or by operation of law, the donee would be only under the same obligation to return the money, that would have existed to return the certificate, if he had continued to hold it, uncollected.

But the actual transaction was entirely different. The indorsement, which accompanied the delivery, qualified it, and limited and restrained the authority of the donee in the collection of the money, so as to forbid its payment until the donor's death. The property in the fund did not presently pass, but remained in the donor, and the donee was excluded from its possession and control during the life of the donor. That qualification of the right, which would have belonged to him if he had become the present owner of the fund, establishes that there was no delivery of possession, according to the terms of the instrument, and that as the gift was to take effect only upon the death of the donor, it was not a present executed gift *mortis causa*, but a testamentary disposition. The right conferred upon the donee was that expressed in the indorsement; and that, instead of being a transfer of the donor's title and interest in the fund, as established by the terms of the certificate of deposit, was merely an order upon the bank to pay to the donee the money called for by the certificate, upon the death of the donor. It was,

in substance, not an assignment of the fund on deposit, but a check upon the bank against a deposit, which, as is shown by all the authorities and upon the nature of the case, cannot be valid as a *donatio mortis causa*, even where it is payable *in presenti*, unless paid or accepted while the donor is alive: how much less so, when, as in the present case, it is made payable only upon his death.

The case is not distinguishable from *Mitchell* v. *Smith*, 4 De G., J. & S. 422, where the indorsement upon promissory notes, claimed as a gift, was, "I bequeath — pay the within contents to Simon Smith, or his order, at my death." Lord Justice Turner said: "In order to render the indorsement and delivery of a promissory note effectual they must be such as to enable the indorsee himself to indorse and negotiate the note. That the respondent, Simon Smith, could not have done here during the testator's life." It was accordingly held that the disposition of the notes was testamentary and invalid.

It cannot be said that the condition in the indorsement, which forbade payment until the donor's death, was merely the condition attached by the law to every such gift. Because the condition, which inheres in the gift *mortis causa*, is a subsequent condition, that the subject of the gift shall be returned if the gift fails by revocation; in the mean time the gift is executed, the title has vested, the dominion and control of the donor has passed to the donee. While here, the condition annexed by the donor to his gift is a condition precedent, which must happen before it becomes a gift, and, as the contingency contemplated is the donor's death, the gift cannot be executed in his lifetime, and, consequently, can never take effect.

This view of the law was the one taken by the Circuit Court as the basis of its decree, in which we accordingly find no error. It is accordingly. *Affirmed.*

DREW *v.* HAGERTY.

SUPREME JUDICIAL COURT OF MAINE. 1889.

[*Reported* 81 *Me.* 231.]

WALTON, J.[1] The most important question is whether the gift of a savings-bank book, from husband to wife, *causa mortis*, is valid without delivery, provided the book is at the time of the alleged gift already in the possession of the wife. The action was tried before the *Chief Justice*, and he ruled that to constitute a valid gift, *causa mortis*, there must be a delivery; that if the property "be at the time already in the possession of the donee, the donor's saying to the donee, 'you may have it,' or 'you may keep it — it shall be yours,' does not pass the property in the case of a gift *causa mortis*."

We think this ruling was correct. If the act of delivery was for no

[1] The opinion only is here printed.

other purpose than to invest the donee with possession, no reason is perceived why it might not be dispensed with, when the donee already had possession. But such is not its only purpose. It is essential in order to distinguish a gift *causa mortis*, from a legacy. Without an act of delivery, an oral disposition of property, in contemplation of death, could be sustained only as a nuncupative will; and in the manner and with the limitations provided for such wills. Delivery is also important as evidence of deliberation and intention. It is a test of sincerity, and distinguishes idle talk from serious purposes. And it makes fraud and perjury more difficult. Mere words are easily misrepresented. Even the change of an emphasis may make them convey a meaning different from what the speaker intended. Not so of an act of delivery. Like the delivery of a turf, or the delivery of a twig, in the ancient mode of conveying estates, or the delivery of a kernel of corn, or the payment of one cent of the purchase money, to make valid a contract for the sale of a cargo of grain, an act of delivery accomplishes that which words alone cannot accomplish. Gifts, *causa mortis*, ought not to be encouraged. They are often sustained by fraud and perjury. It was an attempt to sustain such a gift by fraud and perjury that led to the enactment of the Statute for the prevention of fraud and perjury. See *Matthews* v. *Warner*, 4 Vesey, Jr., 187, 196, note; *Leathers* v. *Greenacre*, 53 Maine, 561, 569. As said in *Hatch* v. *Atkinson*, 56 Maine, 326, it is far better that occasionally a gift of this kind should fail than that the rules of law be so relaxed as to encourage fraud and perjury.

We are aware that some text writers have assumed that when the property is already in the possession of the donee, a delivery is not necessary. But the cases cited in support of the doctrine nearly all relate to gifts *inter vivos*, and not to gifts *causa mortis*. A gift, *inter vivos*, may be sustained without a distinct act of delivery at the time of the gift, if the property is then in the possession of the donee, and the gift is supported by long acquiescence of the donor, or other entirely satisfactory evidence. This court so held in *Wing* v. *Merchant*, 57 Maine, 383, and the jury were so instructed in this case, and the defendant had the benefit of the instruction. But the question we are now considering is not whether a gift, *inter vivos*, can be sustained without a distinct act of delivery, but whether such a relaxation of the law can be allowed in the case of a gift *causa mortis*. We think not. Reason and the weight of authority are opposed to such a relaxation. *Hatch* v. *Atkinson*, 56 Maine, 324, 327; *Lane* v. *Lane*, 76 Maine, 521; *Parcher* v. *Savings Inst.*, 78 Maine, 470; *Dunbar* v. *Dunbar*, 80 Maine, 152; *Miller* v. *Jeffries*, 4 Gratt. 472; *French* v. *Raymond*, 39 Vt. 623; *Cutting* v. *Gilman*, 41 N. H. 147; *Delmotte* v. *Taylor*, 1 Red. (N. Y.) 417; *Egerton* v. *Egerton*, 17 N. J. Eq. 419; *Kenney* v. *Pub. Adm.*, 2 Bradf. (N. Y.) 319; 2 Kent's Com. (10th ed.) 602, and note; *Dickeschied* v. *Exchange Bank*, 28 W. Va. 340; *Walsh's Appeal*, (Pa.) 1 L. R. A. 535, and note.

It is the opinion of the court that the gift of a savings-bank book, *causa mortis*, to be valid, must be accompanied by an actual delivery of the book from the donor to the donee, or to some one for the donee; and that the delivery must be made for the express purpose of consummating the gift; and that a previous and continuing possession by the donee is not sufficient; and that in this, and in all particulars, the rulings in the court below were correct; and that no cause exists for granting a new trial.

PETERS, C. J., DANFORTH, VIRGIN, EMERY, and HASKELL, JJ., concurred.

Motion and exceptions overruled.

Frank L. Noble, for defendant.

Newell and *Judkins*, for plaintiff.

NOTE. — See also on gifts *mortis causa*, *Conser* v. *Snowden*, 54 Md. 175; *Bloomer* v. *Bloomer*, 2 Bradf. 339.

CHAPTER V.

THE MAKING, REVOCATION, AND REPUBLICATION OF WILLS.

NOTE. — The passing of personal property on intestacy might have been here considered, but the administration of intestate estates is so closely connected with that of testate estates that it will be found convenient to consider them subsequently together.

SECTION I.

THE MAKING OF WILLS.

A. *Statutes.*

32 HEN. VIII. c. 1 (1540). — [Be it enacted[1]] that all and every person and persons, having, or which hereafter shall have, any manors, lands, tenements or hereditaments, holden in socage, or of the nature of socage tenure, and not having any manors, lands, tenements or hereditaments, holden of the King our sovereign lord by knights service, by socage tenure in chief, or of the nature of socage tenure in chief, nor of any other person or persons by knights service, from the twentieth day of July in the year of our Lord God M.D.XL. shall have full and free liberty, power and authority to give, dispose, will and devise, as well by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, all his said manors, lands, tenements or hereditaments, or any of them, at his free will and pleasure; any law, Statute or other thing heretofore had, made or used to the contrary notwithstanding.

II. And that all and every person and persons, having manors, lands, tenements or hereditaments, holden of the king our sovereign lord, his heirs or successors, in socage, or of the nature of socage tenure in chief, and having any manors, lands, tenements or hereditaments, holden of any other person or persons in socage, or of the nature of socage tenure, and not having any manors, lands, tenements or hereditaments, holden of the King our sovereign lord by knights service, nor of any other lord or person by like service, from the twentieth day of July in the said year of our Lord God M.D.XL. shall have full and free liberty, power and authority to give, will, dispose and devise, as well by his last will or testament in writing, or otherwise by any act or acts lawfully executed in his life, all his said manors, lands, tenements and hereditaments, or any of them, at his free will and pleasure; any

[1] The preamble is omitted.

law, Statute, custom or other thing heretofore had, made or used to the contrary notwithstanding.

III. Saving alway and reserving to the King our sovereign lord, his heirs and successors, all his right, title and interest of *primer seisin* and reliefs, and also all other rights and duties for tenures in socage, or of the nature of socage tenure in chief, as heretofore hath been used and accustomed, (2) the same manors, lands, tenements or hereditaments to be taken, had and sued out of and from the hands of his highness, his heirs and successors, by the person or persons to whom any such manors, lands, tenements or hereditaments shall be disposed, willed or devised, in such and like manner and form, as hath been used by any heir or heirs before the making of this Statute; (3) and saving and reserving also fines for alienations of such manors, lands, tenements or hereditaments holden of the King our sovereign lord in socage, or of the nature of socage tenure in chief, whereof there shall be any alteration of freehold or inheritance, made by will or otherwise, as is aforesaid.[1]

34 & 35 Hen. VIII. c. 5 (1542). — I. Where in the last Parliament begun and holden at Westminster the thirty-eighth day of April in the thirty-first year of the King's most gracious reign, and thereby divers prorogations holden and continued unto the twenty-fourth day of July in the thirty-second year of his said reign, it was by the King's most gracious and liberal disposition showed towards his most humble and obedient subjects, ordained and enacted how and in what manner lands, tenements, and other hereditaments might be by will or testament in writing, or otherwise by any act or acts lawfully executed in the life of every person, given, disposed, willed or devised, for the advancement of the wife, preferment of the children, payment of debts of every such person, or otherwise at his will and pleasure, as in the same Act more plainly is declared: (2) sithen the making of which Estatute, divers doubts, questions and ambiguities have risen, been moved, and grown, by diversity of opinions, taken in and upon the exposition of the letter of the same Estatute.

II. For a plain declaration and explanation whereof, and to the intent and purpose that the King's obedient and loving subjects shall and may take the commodity and advantage of the King's said gracious and liberal disposition, the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, most humbly beseechen the King's majesty, that the meaning of the letter of the same Estatute, concerning such matters hereafter rehearsed, may be by the authority of this present Parliament enacted, taken, expounded, judged, declared and explained in manner and form following:

III. First, where it is contained in the same former Statute, within divers articles and branches of the same, that all and singular person

[1] See 34 & 35 Hen. VIII. c. 5, § 13. By the other sections of this Act of 32 Hen. VIII. it is provided that two thirds of land held by knight service may be devised.

and persons having any manors, lands, tenements or hereditaments of the estate of inheritance, should have full and free liberty, power and authority to give, will, dispose or assign, as well by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, his manors, lands, tenements or hereditaments, or any of them, in such manner and form as in the same former Act more at large it doth appear. Which words *of estate of inheritance*, by the authority of this present Parliament, is and shall be declared, expounded, taken and judged of estates in fee-simple only.

IV. And also that all and singular person and persons having a sole estate or interest in fee-simple, or seised in fee-simple in coparcenary, or in common in fee-simple, of and in any manors, lands, tenements, rents or other hereditaments, in possession, reversion, remainder, or of rents or services incident to any reversion or remainder, and having no manors, lands, tenements or hereditaments holden of the King, his heirs or successors, or of any other person or persons by knights-service, shall have full and free liberty, power and authority to give, dispose, will or devise to any person or persons (except bodies politic and corporate), by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, by himself solely, or by himself and other jointly, severally or particularly, or by all those ways, or any of them, as much as in him of right is or shall be, all his said manors, lands, tenements, rents and hereditaments, or any of them, or any rents, commons or other profits or commodities out of or to be perceived of the same, or out of any parcel thereof, at his own free will and pleasure; any clause in the said former Act notwithstanding.

XIV. And it is further declared and enacted by the authority aforesaid, that wills or testaments made of any manors, lands, tenements, or other hereditaments, by any woman covert, or person within the age of twenty-one years, idiot, or by any person *de non sane* memory, shall not be taken to be good or effectual in the law.

29 CAR. II. c. 3. — V. And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June all devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills, or by this Statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.

VI. And moreover, no devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall at any time after the said four and twentieth day of June be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator

himself, or in his presence and by his directions and consent; (2) but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burned, cancelled, torn or obliterated by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.

XII. And for the amendment of the law in the particulars following; (2) be it further enacted by the authority aforesaid, that from henceforth any estate *pur auter vie* shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; (3) and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy as assets by descent, as in case of lands in fee-simple; (4) and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

XIX. And for prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury; (2) be it enacted by the authority aforesaid, that from and after the aforesaid four and twentieth day of June no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof; (3) nor unless it be proved that the testator at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, or to that effect; (4) nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

XX. And be it further enacted, that after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

XXI. And be it further enacted, that no letters testamentary or probate of any nuncupative will shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired; (2) nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same, if they please.

XXII. And be it further enacted, that no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.

XXIII. Provided always, that notwithstanding this Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his movables, wages and personal estate, as he or they might have done before the making of this Act.

XXIV. And it is hereby declared, that nothing in this Act shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates, but that the prerogative court of the Archbishop of Canterbury, and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect; subject nevertheless to the rules and directions of this Act.

25 Geo. II. c. 6 (1752). — Whereas by an Act made in the twenty-ninth year of the reign of his late majesty King Charles the Second, intituled, an *Act for Prevention of Frauds and Perjuries;* it is amongst other things enacted, that from and after the twenty-fourth day of June in the year of our Lord one thousand six hundred and seventy-seven, all devises and bequests of any lands or tenements devisable, either by force of the Statute of Wills, or by that Statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction; and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect, which hath been found to be a wise and good provision: but whereas doubts have arisen who are to be deemed legal witnesses within the intent of the said Act; therefore, for avoiding the same, be it enacted by the King's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, that if any person shall attest the execution of any will or codicil which shall be made after the twenty-fourth day of June in the year of our Lord one thousand seven hundred and fifty-two, to whom any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements or hereditaments for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment, shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person

shall be admitted as a witness to the execution of such will or codicil, within the intent of the said Act; notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will or codicil.

II. And be it further enacted by the authority aforesaid, that in case, by any will or codicil already made or hereafter to be made, any lands, tenements or hereditaments are or shall be charged with any debt or debts; and any creditor whose debt is so charged, hath attested or shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said Act.

X. And whereas in some of the British Colonies or plantations in America, the said Act of the twenty-ninth year of the reign of King Charles the Second, has been received for law, or Acts of Assembly have been made, whereby the attestation and subscription of witnesses to devises of lands, tenements and hereditaments have been required: therefore, to prevent and avoid doubts which may arise in the said colonies or plantations, in relation to the attestation of such devises of lands, tenements and hereditaments; be it enacted by the authority aforesaid, that this Act, and every clause, matter and thing therein contained, shall extend to such of the said colonies and plantations, where the said Act of the twenty-ninth year of the reign of King Charles the Second, is by Act of Assembly made, or by usage received as law, or where by Act of Assembly or usage, the attestation and subscription of a witness or witnesses are made necessary to devises of lands, tenements or hereditaments; and shall have the same force and effect in the construction of or for the avoiding of doubts upon the said Acts of Assembly, and laws of the said colonies and plantations, as the same ought to have in the construction of or for the avoiding of doubts upon the said Act of the twenty-ninth year of the reign of King Charles the Second in England.

7 Wm. IV. & 1 Vict. c. 26 (1837). — Be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say), the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures* in capite *and by Knights Service, and Purveyance, and for settling a*

revenue upon His Majesty in lieu thereof, or by virtue of an Act passed in the Parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures* in capite *and by Knights Service*, and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

II. And be it further enacted, that an Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled *The Act of Wills, Wards, and Primer Seisins, whereby a man may devise two parts of his land;* and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled *The Bill concerning the Explanation of Wills;* and also an Act passed in the Parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled *An Act how Lands, Tenements, etc., may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;* and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled *An Act for Prevention of Frauds and Perjuries*, and of an Act passed in the Parliament of Ireland in the seventh year of the reign of King William the Third, intituled *An Act for Prevention of Frauds and Perjuries*, as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate, *pur autre vie*, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an Act passed in the fourth and fifth years of the reign of Queen Anne, intituled *An Act for the Amendment of the Law and the better Advancement of Justice*, and of an Act passed in the Parliament of Ireland in the sixth year of the reign of Queen Anne, intituled *An Act for the Amendment of the Law, and the better Advancement of Justice*, as relates to witnesses to nuncupative wills; and also so much of an Act passed in the fourteenth year of the reign of King

George the Second, intituled *An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries,"* as relates to estates *pur autre vie;* and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled *An Act for avoiding and putting an End to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that Part of Great Britain called England, and in His Majesty's Colonies and Plantations in America*, except so far as relates to His Majesty's Colonies and Plantations in America; and also an Act passed in the Parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled *An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestations of Wills and Codicils concerning Real Estates;* and also an Act passed in the fifty-fifth year of the reign of King George the Third, intituled *An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will*, shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively relate to any wills or estates *pur autre vie*, to which this Act does not extend.

III. And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the

same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

VI. And be it further enacted, that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

VII. And be it further enacted, that no will made by any person under the age of twenty-one years shall be valid.

VIII. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act.

IX. And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.[1]

X. And be it further enacted, that no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

XI. Provided always, and be it further enacted, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

[1] See 15 & 16 Vict. *c.* 24.

XIII. And be it further enacted, that every will executed in manner hereinbefore required shall be valid without any other publication thereof.

XIV. And be it further enacted, that if any person who shall attest the execution of a will shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

XV. And be it further enacted, that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

XVI. And be it further enacted, that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

XVII. And be it further enacted, that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

XVIII. And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distribution).

XIX. And be it further enacted, that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

XX. And be it further enacted, that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

XXI. And be it further enacted, that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

XXII. And be it further enacted, that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

XXIII. And be it further enacted, that no conveyance or other Act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an Act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

XXIV. And be it further enacted, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

XXXIV. And be it further enacted, that this Act shall not extend to any will made before the first day of January one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

NOTE. — For the American Statutes on the Making, &c., of Wills, see Stimson, Am. Stats.

See Sect XXVI for Caused & void devises 68/a

B. *Fraud and Undue Influence.*

NOTE. — A large part of the litigation on wills arises upon the question of mental capacity; but the decision of this question turns mostly on matters of fact, or on the law of evidence, which has properly no place here.

KENNELL *v.* ABBOTT.

CHANCERY. 1799.

[*Reported* 4 *Ves.* 802.]

JAMES HICKMAN by his will, dated the 18th of April, 1782, gave to his wife Catherine £300 4 per cent Consolidated Bank Annuities; and appointed her sole executrix. Upon his death she possessed herself of his personal estate; paid his debts, &c.; and exhibited the probate to the bank; but not applying to be at liberty to transfer the stock into her own name, it continued to stand in the name of the testator.

In 1783 a marriage ceremony was performed between Catherine Hickman and Edward Lovell: but that marriage was void; Lovell having been married in 1775; and his wife being living. He cohabited with his wife till 1781. By articles executed previously to the marriage ceremony with Catherine Hickman, dated the 3d of January, 1783, she agreed to transfer the said stock upon the trusts therein mentioned, with power to her to dispose of it after the decease of the survivor of herself and Lovell. She never discovered the invalidity of her marriage; and being seised to her and her heirs of a copyhold estate, which she had surrendered to the use of her will, and being possessed of a leasehold estate for a long term of years determinable upon lives, and of personal estate, she made her will, duly attested according to the Statute of Frauds, describing herself the wife of Edward Lovell; and by virtue of the power and authority given her before her marriage with her present husband Edward Lovell, she publishes and declares her last will and testament; giving the said £300 stock to her brother Thomas Abbott, in trust to pay the interest to her niece Betty Kennell for life; and after her decease the principal to be equally divided between her two daughters share and share alike. She gave some leasehold premises to her nephew Martin Togood, his executors and administrators. She gave a copyhold estate, which she had surrendered to the use of her will, to her brother Thomas Abbott and his heirs, in trust to sell, and out of the moneys arising therefrom to pay the following legacies: "to my husband the said Edward Lovell the sum of £150;" to her brother Thomas Abbott £20; to her nephew James Fabian, her niece Elizabeth Cox, and her nephew George Togood,

£10 each; and she directed these legacies to be paid within twelve months after her decease. She gave another leasehold estate to her great niece Catherine Kennell, her executors, &c., and she gave all her household goods, plate, furniture, and stock in husbandry, to her brother Thomas Abbott, his executors and administrators, in trust to sell, and out of the produce, to put in the life of her said great niece into the said leasehold premises, if she (the testatrix) should not do it in her life. She gave her wearing apparel and linen to her niece Betty Kennell; and as to the residue of the purchase-money arising from the sale of her said copyhold estate, household goods, and furniture, and all the rest, residue, and remainder, of her moneys, securities for money, personal estate and effects, whatsoever and wheresoever, that she should die possessed of, interested in, or entitled to, or whereby she had power to dispose by will, she gave to her said niece Betty Kennell, her executors and administrators, subject to her debts and funeral expenses; and she appointed Thomas Abbott guardian of the children of Betty Kennell, and appointed Betty Kennell executrix.

The testatrix died; leaving Edward Lovell surviving her, and John Abbott, her eldest brother, her heir-at-law. Betty Kennell proved her will: but the probate was limited to the £300 stock, and £100 stock supposed to be standing in the name of, and purchased by, the trustees, under the articles of the 3d of January, 1783. Edward Lovell died; leaving an infant son by his lawful wife Ann Lovell; with whom he lived till 1781. She died in 1788.

The bill was filed by legatees under the will of Catherine Hickman; praying, that the trusts of her will may be established, except so far as relates to the bequest to Edward Lovell and the lapsed legacy to James Fabian, who died in the life of the testatrix, and to the guardianship of the infant plaintiffs; and that the pretended marriage articles may be declared void.

The question arose upon the legacy of £150 given to Edward Lovell: which was claimed on the part of his infant son. Supposing that legacy void, it was claimed by the residuary legatee by the heir, and also by the next of kin.

Mr. Woodeson, for the plaintiffs.

Mr. Cox, for the defendant Lovell.

Master of the Rolls. [Sir Richard Pepper Arden.] This case has stood a long time; and I believe, the reason I have not been desired to give my judgment, is, that it has abated; and perhaps it may be unnecessary to give it. But as upon very full consideration I have made up my mind, it may be of use, that the parties may know my opinion, in case they think fit to revive it.

The cause arises upon the will of Catherine Hickman; who supposed herself to be married to Edward Lovell; with whom she had celebrated a marriage. It now appears that he was a married man at that time; therefore she is in fact a single woman; and it was a gross fraud as to her. She made her will in execution of the power given to her by the

articles executed previously to the supposed marriage; and not aware that she was a single woman. Upon that will the questions arise. The first question is, whether this legacy of £150 charged upon the produce of the sale of the copyhold estate devised in trust to be sold is or is not a legacy, which this man can claim under the circumstances that it is given to him as the husband of the testatrix; though he does not possess that character. I thought it a case rather novel in its circumstances, and that scarcely has afforded any decision in the law of England; though there are some *dicta* in the civil law, that seem to bear upon the point. The passage cited from the Code, I think, does not much apply. The passage in the Digest is: "Falsam causam legato non obesse verius est, quia ratio legandi legato non cohæret; sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse."

The meaning is, that a false reason given for the legacy is not of itself sufficient to destroy it: but there must be an exception of any fraud practised; from which it may be presumed, the person giving the legacy would not, if that fraud had been known to him, have given it. That from a book of great authority seems to be the principle of the civil law.

The question is, whether according to the law of England that can apply to a case like the present; and whether the law will permit a man, who obtains a legacy in such a manner, to have the benefit of it. I have not been able to find anything that bears any very decisive analogy to this; but upon general principles I am of opinion, it would be a violation of every rule that ought to prevail as to the intention of a deceased person, if I should permit a man availing himself of that character of husband of the testatrix, and to whom in that character a legacy is given, to take any part of the estate of a person whom he so grossly abused; and who must be taken to have acted upon the duty imposed upon her in that relative character. I desire to be understood not to determine, that, where from circumstances not moving from the legatee himself the description is inapplicable, as where a person is supposed to be a child of the testator, and from motives of love and affection to that child, supposing it his own, he has given a legacy to it, and it afterwards turns out that he was imposed upon, and the child was not his own, I am not disposed by any means to determine that the provision for that child should totally fail: for circumstances of personal affection to the child might mix with it; and which might entitle him; though he might not fill that character in which the legacy is given. My decision therefore totally avoids such a point. Neither would I have it understood, that if a testator in consequence of supposed affectionate conduct of his wife, being deceived by her, gives her a legacy, as to his chaste wife, evidence of her violation of her marriage vow could be given against that. It would open too wide a field. But this decision steers clear of that point. This is a legacy to her supposed husband and under that name. He was the husband of another person.

He had certainly done this lady the grossest injury a man can do to a woman; and I am called upon now to determine, whether the law of England will permit this legacy to be claimed by him. Under these circumstances I am warranted to make a precedent; and to determine, that wherever a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it; and therefore he cannot demand his legacy.

A case (*Ex parte Wallop*, 4 Bro. C. C. 90) something like this occurred lately; which took up so much time before the Lords Commissioners upon an application for a writ *de ventre inspiciendo* against a woman, who had lived with Mr. Fellowes, and had made him believe she had been brought to bed of several children: which he was weak enough to suppose his. It was not a question whether they were his children; for if so, I do not apprehend the decree would have been such as it was. But there were no such children. She had shown him children as hers, which were not hers; and he gave legacies to them, as her children by him. It was held, that they were not entitled. There two things were wanting. The testator was not merely deceived as to their being his children; but he was deceived as to the other ingredient of the character in which he gave them the legacies; for they were not the children of that woman. Therefore, upon the principle I have mentioned from the Digest, and that ought to govern courts of justice, I am of opinion this legacy could not be claimed.

[The Master of the Rolls then considered the question, whether the legacy would fall into the residue, and he determined that it would. This part of the opinion is omitted.[1]]

[1] "Here it is said that the fraud was not committed for the purpose of obtaining the will. I cannot agree in this. Though we term the conduct alleged in this case fraudulent concealment, it is equivalent to fraudulent misrepresentation. When the lady went through the ceremony of marriage with the testator, she in effect represented to him that she was capable of becoming his lawful wife, and every day while they were living together she must be taken as continuously representing to him that she was his lawful wife. If at the same time she knew that her former husband was alive, this was what the court would take notice of as a fraudulent misrepresentation. For what purpose were these representations made? To obtain all the benefits of the position of the testator's lawful wife, and a testamentary provision in case she survives her husband, is one of the advantages which a wife most naturally expects. The misrepresentations must, therefore, be treated as made, among other things, for the purpose of obtaining a will in her favor, and it makes no difference whether this particular advantage was actually present to her mind or not." — *Per* MELLISH, L. J., in *Meluish* v. *Milton*, 3 Ch. Div. 27, 34, 35 (1876).

See *Rishton* v. *Cobb*, 5 Myl. & Cr. 145 (1839).

BARRY *v.* BUTLIN.

PRIVY COUNCIL. 1838.

[*Reported* 2 *Moore, P. C.* 480.]

PENDOCK BARRY, of Tollerton Hall, in the county of Nottingham, the testator, respecting the validity of whose will the present appeal arose, died on the 13th of March, 1833, at the age of seventy-six years, a widower, leaving behind him the appellant, his son and heir, and only next of kin.

On the 24th of September, 1827, the deceased executed his will in duplicate, at the house of Percy, his attorney, in the presence of two witnesses, whereby he appointed the respondent, James Butlin, sole executor and residuary legatee, and amongst other legacies bequeathed to Percy £3,000, to Butlin £2,000, and to Whitehead, his butler, £3,000.

The validity of this will was disputed by the appellant, on the ground that the execution was procured by the fraud and conspiracy of Percy, Butlin, and Whitehead, at a time when the deceased was of unsound mind, and wholly incapable of making or executing a will, or of doing any act requiring thought, judgment, and reflection.

The respondent propounded the above will for probate in the Prerogative Court of Canterbury.

A *caveat* having been entered by the appellant, allegations and exhibits were brought in by both parties, and witnesses examined in support thereof.

The facts and circumstances pleaded, and material to the issue, are stated very fully in the judgment.

After various interlocutory proceedings, the judge of the Prerogative Court, *Sir Herbert Jenner*, on the 5th of September, 1837 (reported 1 Curteis, Ecc. Rep. 614), pronounced for the force and validity of the will.

The appellant appealed from this sentence to the Queen in Council.

Mr. Cresswell, Q. C., and *Dr. Addams*, for the appellant.

The Queen's Advocate (*Sir John Dodson*) and *Mr. Thesiger*, Q. C., for the respondent.

MR. BARON PARKE. The rules of law according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present appeal: and they have been acquiesced in on both sides. These rules are two; the first, that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator.

The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

These principles, to the extent that I have stated, are well established. The former is undisputed. The latter is laid down by Sir John Nicholl, in substance, in *Paske* v. *Ollatt*, 2 Phill. 323; *Ingram* v. *Wyatt*, 1 Hagg. Ecc. Rep. 388; and *Billinghurst* v. *Vickers*, 1 Phill. 187; and is stated by that very learned and experienced judge to have been handed down to him by his predecessors, and this tribunal have sanctioned and acted upon it in a recent case; that of *Baker* v. *Batt*, 2 Moore, P. C. 317.

Their Lordships are fully sensible of the wisdom of this rule, and the importance of its practical application on all occasions. At the same time their Lordships think it fit to observe, especially as there has been some discussion upon these points, towards the close of this inquiry, that some of the expressions reported to have been used by Sir John Nicholl in laying down this doctrine, appear to them to be somewhat equivocal, and capable of leading into error in the investigation and decision of questions of this nature. It is said that where the party benefited prepares the will, "the presumption and *onus probandi* is against the instrument, and the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper;" and that "where the capacity is doubtful, there must be proof of *instructions or reading over*." If, by these expressions, the learned judge meant merely to say, that there are cases of wills prepared by a legatee, so pregnant with suspicion, that they ought to be pronounced against in the absence of evidence in support of them, and that extending to clear proof of the actual knowledge of the contents, by the supposed testator, and that instructions proceeding from him, or the reading over the instrument by or to him, are the most satisfactory evidence of such knowledge; we fully concur in the proposition so understood; in all probability the learned judge intended no more than this. But if the words used are to be construed *strictly;* if it is intended to be stated as a rule of law, that in every case in which the party preparing a will derives a benefit under it, the *onus probandi* is shifted, and that not only a certain measure but a particular species of proof is thereupon required from the party propounding the will, — we feel bound to say that we assume the doctrine to be incorrect.

The strict meaning of the term *onus probandi* is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases the *onus* is imposed on the party propounding a will; it is in general discharged by proof of capacity and the fact of execution, from which the knowledge of and

assent to the contents of the instrument are assumed, and it cannot be that the simple fact of the party who prepared the will being himself a legatee, is in every case, and under all circumstances, to create a contrary presumption, and to call upon the court to pronounce against the will, unless additional evidence is produced to prove the knowledge of its contents by the deceased. A single instance, of not unfrequent occurrence, will test the truth of this proposition. A man of acknowledged competence and habits of business, worth £100,000, leaves the bulk of his property to his family, and a legacy of £50 to his confidential attorney, who prepared the will: would this fact throw the burden of proof of actual cognizance by the testator, of the contents of the will, on the party propounding it, so that if such proof were not supplied, the will would be pronounced against? The answer is obvious, it would not. All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is, at most, a suspicious circumstance, of more or less weight, according to the facts of each particular case; in some of no weight at all, as in the case suggested, varying according to circumstances; for instance, the *quantum* of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies: but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased.

Nor can it be necessary, that *in all such cases*, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for, or reading over, the instrument. They form, no doubt, the *most* satisfactory, but they are not the *only* satisfactory description of proof, by which the cognizance of the contents of the will may be brought home to the deceased. The court would naturally look for such evidence; in some cases it might be impossible to establish a will without it, but it has no right in every case to require it.

I have said this much upon the rules of law applicable to this case, with the concurrence of all their Lordships who heard the argument, not particularly with a view to the decision of this case, but in order to prevent any misconception upon a subject of so great practical importance; at the same time their Lordships wish it to be distinctly understood, that entirely acquiescing in the propriety of the rule, so qualified and explained, they should be extremely sorry if anything which has fallen from them should have the effect of impeding its full operation.

The case which their Lordships have now to decide has been argued at the bar with much industry and ability on both sides; and all their Lordships have besides had an ample opportunity of perusing and considering with due care and attention the immense mass of evidence, more or less material, which was adduced in the court below — as the

result of that consideration has been to satisfy our minds, that the decree of the judge of the Prerogative Court was right, it is not necessary to go into the same minute statements, or comment upon the evidence in the cause in detail, which we should have thought it our duty to have done if we had happened to arrive at a different conclusion from that of the learned judge. Adopting the principles above laid down, and admitted on both sides, we are all quite satisfied that the deceased was competent, and that the paper propounded by the respondent is proved to be his true last will, and to express his real intentions.

A tolerably just estimate may be formed of the character and mental powers of Mr. Barry, the deceased, from the parol evidence on both sides, after making some allowance for the bias under which some of the witnesses speak, and the written documents, which are proved by the hand-writing of the deceased.

From these sources it may be collected, that he was a person of slender capacity, of a retired disposition, indolent habits, and addicted to drinking, somewhat singular in his appearance, frivolous, and even childish in his amusements and occupations. On the other hand, it is clear that he was not insane, and although the evidence embraces a period of more than fifty years, and an account of most of the transactions of his life, there is no satisfactory evidence of a single act, denoting that he was laboring under delusions, or indicating such a degree of folly as to show that he was unfit to be trusted with the management of his own concerns. Though certainly not a man of business, he was capable of transacting the ordinary affairs of life, and the letters produced under his hand, and the parol evidence of the annual settlement of his accounts, and attendance at the bankers, distinctly show that he paid considerable attention to his pecuniary concerns, and was competent to the conduct of his own affairs. It is not indeed disputed on one side but that he was of testable capacity, nor on the other that he was a person of weak mind: as to the extent of that weakness there is a difference, but admitting its existence, even to the degree represented on the part of the appellant, the only consequence will be, that it adds to the suspicion which unquestionably belongs to the circumstance of the attorney who prepared the will taking no less than a fourth of the estate, and the legatees taking the whole to the exclusion of his own family, and calls upon us to watch the proof of the will itself with increased jealousy and suspicion.

The question is, whether these grounds of suspicion have been satisfactorily removed, and the instrument proved to be the real will of the testator himself. That he should pass over his own relations is rendered highly probable under the unhappy circumstances of this case. If, all the other facts of the case being as they were, he had lived on terms of affectionate intercourse with his son; had received him occasionally as an inmate of the house, or had habitually corresponded with him, and had always expressed for him parental

regard, the case would have been one of much greater suspicion, and more difficult to decide than it is; but, unhappily, there is proof of estrangement from his only son, so clear and distinct as to admit of no doubt, and upon grounds which, whether the charges against the son were true or false, cannot assuredly be deemed irrational. Though Mr. Barry Barry had been guilty of violent conduct which is deposed to by some of the witnesses, and that operating on the timidity of his father, might have sometimes excited his fears; it is clear from the correspondence that his father was on a friendly footing with him, and professed much regard for him, even after that gentleman had absconded to avoid being taken on a bench warrant, founded upon the charge against him; but after the time that he declined to take his trial at the assizes, in March 1814, and thereby afforded a strong ground for believing that the charge was true; all intercourse ceased, the deceased never wrote to, or saw his son afterwards — he held no communication whatever with him, and in December 1819, when in the absence of Whitehead and Butlin, under whose control the deceased is supposed to have been, Mr. Barry Barry went to his father's house, his father of his own accord excluded him from his presence, and it appears to be clear that from the month of March, 1814, he ceased to speak of him except as an unfortunate and unhappy man. In this state of complete alienation from his son, it is by no means unnatural to suppose that he would not make him the object of his bounty, but that he would seek elsewhere for those on whom he would bestow it.

After his daughter's death in 1821, he had no relations except the Neales: from them also it is equally clear that his regards, if he ever entertained any, were estranged. With Pendock, who died in September 1816, he had unfortunately quarrelled, and he kept up no intercourse with the other members of that family: under these circumstances it is highly probable that he would make a will in order to prevent his son enjoying his property, and that as none of his relations were on terms of friendship with him, he would bestow his bounty on those persons who were; and none seem to have been in habits of intercourse with him more than Mr. Percy and Mr. Butlin, and it is by no means improbable that he would give a part to an old servant in whom he had reposed great confidence and trust. It is true that this confidence was in some respect misplaced, and Whitehead seems to have taken liberties in his master's house which he could hardly have sanctioned; but still it does not appear that his master knew it, and he was intrusted to the last with the management of his domestic affairs.

With these probabilities then in favor of the will propounded, let us look at the evidence of the *factum*, which though not so strong as direct proof of written instructions, to the full extent of the will, or direct proof that it was read over, is still of a very satisfactory nature, and, with the other circumstances to which I have adverted, leaves the mind permanently satisfied that the instrument expresses his real wishes.

In the first place, it is a fact beyond dispute that Mr. Percy, who prepared the will, at all events *meant* that it should be fairly and openly executed in the presence of respectable witnesses. Mr. Smith was certainly applied to by him for that purpose, and could not attend. Dr. Davidson and Mr. Chapman, all answering that description, did attend. This circumstance is strong to prove the absence of clandestinity and fraud.

There were instructions for the burial and funeral, in the handwriting of the testator. These prove no more than that his mind was directed on the subject of arrangement after his death; but they do not carry the case further, they do not lead necessarily to the inference that he had a will in view; but *Exhibit C.* is proved by a witness named Gough (and there is no fair ground to disbelieve his evidence) to have been transmitted to the deceased. It incorporated the *Memorandum D.*, and was a draft of the will, and that draft, in a page of it which contains the legacies to Whitehead and his wife, is twice altered in the handwriting of the testator; which distinctly proves that his mind was employed on the subject, and affords reasonable evidence that he was cognizable of its contents. In addition to this, Gough proves that it was Mr. Barry who sent him to desire Mr. Chapman "to come and see him execute his *will*." He also sent him with the same message to Dr. Marsden, but that gentleman was not at home; Dr. Davidson, who did attest it, expressly swears that Mr. Barry declared it to be his last will and testament, and requested him and Mr. Chapman to witness it; and he adds his belief that Mr. Barry was of perfectly sound mind, memory, and understanding, and capable of doing any act which required thought, judgment, and reflection. It is suggested that there was some secrecy in the preparation of the will in Mr. Percy's office, for Nightingale, who was an old clerk, did not know it; but we think that this does not raise any inference of this kind, as it may naturally be accounted for by the practice of intrusting different matters of business to different clerks, and if a fraud had been intended and concocted between three legatees it is rather more likely that Nightingale, who was an associate of Whitehead, should be employed, than Gough, who was not.

We think, therefore, on the whole, that the evidence of the *factum*, coupled with the strong probabilities of the case, is sufficient to remove the suspicions which naturally belong to the case of all wills prepared by persons in their own favor, especially when made by those of weak capacity. The undue influence, and the importunity which, if they are to defeat a will, must be of the nature of fraud or duress, exercised on a mind in a state of debility, are insinuated but not proved.

Whitehead's authority and power over his master is, no doubt, sufficiently established; but that such authority and power were in any way exercised to procure this will to be made is only conjecture; and there is nothing like proof of authority or control of any kind on the part of Butlin or Percy.

We are, therefore, of opinion that the will is established, and ought

to be admitted to proof. We have entertained some doubt as to the propriety of that part of the decree which condemns the appellant in the costs subsequent to the giving in his allegation dated the 7th of November, 1833. The case is one in which the appellant was well justified in calling for the proof of the will, and watching and sifting that proof, and he certainly ought not to have had to pay the costs of that inquiry. But as the case made by his allegation was a charge in the nature of conspiracy and fraud, and that charge has failed, and as a part of it, and that causing no small addition to the expense, is introduced for a collateral purpose, not material to the decision of this suit, we do not think we ought to vary the decree of the court below in respect to the costs, and the appeal must be consequently dismissed, and we think with costs.[1]

WILKINSON *v.* JOUGHIN.

CHANCERY. 1866.

[*Reported L. R.* 2 *Eq.* 319.]

WILLIAM THOMPSON, who died in July, 1864, by his will dated the 20th of May, 1864, devised and bequeathed all his real and personal estate to the plaintiff and the defendant Joughin, whom he also appointed executors, upon trust "to permit my wife, Adelaide, to receive from my death the net annual income thereof during her life." And after her death the testator directed his trustees to sell his real estate, and to convert and get in his personal estate, and to invest the moneys to arise in trust for the benefit of his children; but if no child of his should attain the age of twenty-one, or be married, then upon trust to pay certain legacies; and as to the residue, "In trust for my stepdaughter, Sarah Ward, for her absolute use. But in case she shall die without leaving issue, upon trust to pay the same moneys to John Wilkinson and my cousin, Anne Hammond, in equal shares. I direct that my wife shall out of the income of my said estate maintain, educate, and bring up my children until the age of twenty-one years (but my trustee shall not be obliged to see this direction fulfilled), and that she shall receive and enjoy such income as her separate estate, without the control or interference of any future husband, and her receipt to be, notwithstanding coverture, an effectual discharge for the same."

The testator left no issue him surviving. The bill alleged that on the 15th of October, 1849, Thomas Ward and Adelaide Ward (then Rowntree) were married at Great Grimsby, and that the defendant Sarah Ward was a child of that marriage; and that on the 20th of May, 1863, the defendant Adelaide Ward and the testator went through the ceremony of marriage at Liverpool — the defendant Adelaide Ward

[1] See *Durling* v. *Loveland*, 2 Curt. 225 (1839).

having represented herself to the testator as, and he having believed her to be, a widow — the defendant Thomas Ward, her husband, being then, and in March, 1865, when the bill was filed, alive. The plaintiff submitted to the judgment of the court, whether the defendant Adelaide Ward, or the defendant Thomas Ward, her husband, in her right, could take any interest under the will; and also what interest (if any) the defendant Sarah Ward took under it; and prayed that the trusts might be performed by the court, and for a declaration as to the rights of all persons interested under the will, and for an account and inquiries. The evidence, in the view taken of it by the court, sustained the conclusion that the misrepresentation by Adelaide Ward was wilful.

Mr. Malins, Q. C., and *Mr. Horsey*, for the plaintiff.

Mr. Bardswell, for the defendants, the Wards.

Sir John Stuart, V. C. In my opinion the bequest in favor of Adelaide Ward is void. She has sworn in her answer that which has been distinctly disproved. The evidence shows that she imposed in a gross manner upon the testator. Therefore, there must be a declaration to the effect that the bequest to Adelaide Ward, the pretended wife of the testator, is wholly void, and then there must be the usual decree for administration.

The right of the infant, Sarah Ward, seems to me very clear. An attempt has been made to show that inasmuch as the testator was defrauded by the woman whom he believed to be his wife, and was, through that fraud, induced to believe that her child was his step-daughter, the bequest to her wholly fails. But in the case referred to of *Kennell* v. *Abbott*, 4 Ves. 802, Lord Alvanley took care to distinguish between the cases of an innocent and a fraudulent legatee, and in my opinion there is no warrant for saying, where the testator knew this infant legatee personally, and intended to benefit her personally, that the language of the will is not a sufficient description. Sarah Ward, therefore, is entitled under the will, but I have some difficulty in saying that she is absolutely entitled, as there is a gift over in case she shall die under twenty-one years of age, and without issue.

Declare that the gift to Sarah Ward is valid, and the question, whether absolutely or not, will be left open until the hearing on further consideration.

HALL *v.* HALL.

Court of Probate. 1868.

[*Reported L. R.* 1 *P. & D.* 481.]

This was a testamentary suit in which the plaintiff, Ann Hall, propounded the will of her deceased husband, John Hall. The defendant, William Hall, the brother of the deceased, pleaded that the will was obtained by the undue influence of the plaintiff. Issue was joined on

this plea, and the cause was tried on the 6th and 7th of March, 1868, before Sir J. P. Wilde, by a special jury. The only plea being undue influence, the defendant opened the case. The deceased was a farmer and land valuer near Nottingham, and by the will in question he left the whole of his property, of the value of between £15,000 and £20,000, to his wife. The evidence called on the part of the defendant was to the effect that he had made this will solely in consequence of the violence and the threats of the plaintiff, and for the sake of peace and quietness; and that it did not express his real testamentary intentions. The evidence in support of the will was to the effect that it was the voluntary act of the deceased, and that so far from the plaintiff having used violence and threats, she had not even used persuasion to induce him to make it.

Sir R. Collier, Q. C., *A. Staveley Hill*, Q. C., and *Weightman*, were for the plaintiff.

Dr. Spinks, Q. C., and *Dr. Tristram*, for the defendant.

Sir J. P. Wilde, in summing up, gave the following direction to the jury on the question of undue influence: To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, — these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of some one else's.

His Lordship went on to say that in this case the question was one of credibility, for, according to the evidence on the one side, the plaintiff had procured the will by violence, threats and intimidation, whilst, according to the evidence of the plaintiff and her witnesses, she had not even resorted to persuasion.

The jury found that the plea of undue influence was proved.

The court pronounced against the will and condemned the plaintiff in costs.[1]

[1] "In a popular sense, we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if in these circumstances the young man, influenced by

PARFITT *v.* LAWLESS.

COURT OF PROBATE. 1872.

[*Reported L. R.* 2 *P.* & *D.* 462.]

THE plaintiff, Rev. Charles Parfitt, D.D., propounded the will of Jane Conolly, of Cottles, near Bath, in the county of Wilts, widow, bearing date the 16th of July, 1862. The defendant, Philip Lawless, pleaded originally that the will was not executed in accordance with the requirements of the Statute 1 Vict. c. 26, that the deceased was not of sound mind at the time of execution, and that, as regards the residue, the will was obtained by undue influence of the plaintiff.

his regard for the person who had thus led him astray, were to make a will and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man so to dispose of his property; provided only, that in making such a will the young man was really carrying into effect his own intention formed without either coercion or fraud.

"I must further remark that all the difficulties of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion, are greatly enhanced when the question is one between husband and wife. The relation constituted by marriage is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish; and this is the case with which your Lordships have now to deal.

"In order, therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency. A will thus made may possibly be described as obtained by coercion. So as to fraud. If a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed, such contrivance may, perhaps, be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive. It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that allowing a fair latitude of construction, they must range themselves under one or other of these heads, — coercion, or fraud.

"One point, however, is beyond dispute, and that is, that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it." — *Per* LORD CRANWORTH, C., in *Boyse* v. *Rossborough*, 6 H. L. C. 2, 47–49 (1857).

Subsequently the two first pleas were withdrawn. Mrs. Conolly's husband, who died in 1850, was possessed of a considerable estate called the Cottles estate, valued at £63,000, and other property. He left a life interest in it to his widow, and on her decease he bequeathed it to his son (by a previous wife), Charles John Thomas Conolly, absolutely; but in case his son died in the lifetime of the widow without issue, then the estate was to become hers absolutely subject to an annuity for life of £2,500 to the son's widow. Charles John Thomas Conolly died a few days before Jane Conolly, leaving a widow but no issue. The property, exclusive of the interest under her husband's will, of which the deceased died possessed was of the value of £7,000. The will propounded was divided into two parts: by the first she disposed of the property she then possessed, and gave the residue thereof to the plaintiff; and in the second she referred to her interest under her husband's will, and in case she should come into possession of the Cottles estate she charged it with annuities to the amount of £740, and subject to such charges bequeathed it to the plaintiff. The plaintiff is a priest of the Roman Catholic Church, and from the year 1848 until her death resided with the deceased and her husband as domestic chaplain; for a greater portion of the time he also acted as her confessor. The question at issue was tried before *Lord Penzance* and a special jury on the 20th and 21st December, 1871. The defendant, upon whom the burden of proof lay, produced several witnesses, but the court held he gave no evidence to go to the jury. With the leave of the court his counsel then called the plaintiff and examined and ultimately cross-examined him as a hostile witness, but the court still held that no sufficient case of undue influence to go to a jury had been offered, and directed the jury to find a verdict for the plaintiff, which they did, and probate was granted of the will on formal proof of execution. On the 24th of January, 1872, before Lord Penzance, Mellor and Brett, JJ., an application for a new trial was made on the ground of misdirection, and a rule *nisi* was ordered to issue, which came on for argument before Lord Penzance, Pigott, B., and Brett, J.

April 24, 25. *Denman*, Q. C., *Dr. Spinks*, Q. C., and *Bayford*, for the plaintiff, showed cause against the rule.

Digby Seymour, Q. C., *Ballantine*, *Serjt.*, and *Dr. Tristram*, for the defendant.

Cur. adv. vult.

July 25. Lord Penzance. This rule was granted in order to consider a suggestion strongly pressed that the rules adopted in the courts of equity in relation to gifts *inter vivos* ought to be applied to the making of wills. In equity, persons standing in certain relations to one another — such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward — are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favor of him who holds the position of influence is impeached by him who is

subject to that influence, the courts of equity cast upon the former the burden of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence. Applying this view of the subject to the making of a will, it was contended in this case that it was enough to show that a legatee fell within the class enumerated, and that, having done so, the onus was cast upon him of proving that his legacy was not obtained by undue influence. It would be an answer to this argument to say that this has never been, and is not the law in this or any other court regarding wills; and that, if this court should presume to make a new law on the subject, it would establish one rule in regard to personalty, while another would remain the existing rule in regard to realty. "One point, however, is beyond dispute," said Lord Cranworth, in *Boyse* v. *Rossborough*, 6 H. L. C. at p. 49, "and that is, that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed." But in truth the cases in equity apply to a wholly different state of things. In the first place, in those cases of gifts or contracts *inter vivos* there is a transaction in which the person benefited at least takes part, whether he unduly urges his influence or not; and in calling upon him to explain the part he took, and the circumstances that brought about the gift or obligation, the court is plainly requiring of him an explanation within his knowledge. But in the case of a legacy under a will, the legatee may have, and in point of fact generally has, no part in or even knowledge of the act; and to cast upon him, on the bare proof of the legacy and his relation to the testator, the burden of showing how the thing came about, and under what influence or with what motives the legacy was made, or what advice the testator had, professional or otherwise, would be to cast a duty on him which in many, if not most cases, he could not possibly discharge. A more material distinction is this: the influence which is undue in the cases of gifts *inter vivos* is very different from that which is required to set aside a will. In the case of gifts or other transactions *inter vivos* it is considered by the courts of equity that the natural influence which such relations as those in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are, therefore, set aside unless the party benefited by it can show affirmatively that the other party to the transaction was placed "in such a position as would enable him to form an absolutely free and unfettered judgment." *Archer* v. *Hudson*, 7 Beav. 551.

The law regarding wills is very different from this. The natural influence of the parent or guardian over the child, or the husband over the wife, or the attorney over the client, may lawfully be exerted to

obtain a will or legacy, so long as the testator thoroughly understands what he is doing, and is a free agent. There is nothing illegal in the parent or husband pressing his claims on a child or wife, and obtaining a recognition of those claims in a legacy, provided that that persuasion stop short of coercion, and that the volition of the testator, though biassed and impressed by the relation in which he stands to the legatee, is not overborne and subjected to the domination of another.

The influence which will set aside a will, says Mr. Justice Williams, "must amount to force and coercion destroying free agency; it must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear." Williams' Executors, pt. 1, bk. 2, ch. 1, § 2. This difference, then, between the influence which is held to be undue in the case of transactions *inter vivos*, and that which is called undue in relation to a will or legacy, is all-important when a question arises of making presumptions or adjusting the burden of proof. For it may be reasonable enough to presume that a person who had obtained a gift or contract to his own advantage and the detriment of another, by way of personal advice or persuasion, has availed himself of the natural influence which his position gave him. And in casting upon him the burden of exculpation, the law is only assuming that he has done so. But it is a very different thing to presume, without a particle of proof, that a person so situated has abused his position by the exercise of dominion or the assertion of adverse control.

For these reasons it seems to me that it would be improper and unjust to throw upon a man in the position of the plaintiff, without any proof that he had any hand whatever in the making of this will, the onus of proving negatively that he did not coerce the testatrix into devising the residue of her land to him. I say coerce, for this is the only matter involved in a plea of undue influence. Lord Cranworth appears in the case above cited to have regarded fraud as a species of undue influence. It is a mere question of terms; but by the rules of pleading established in this court since December, 1865, fraud, which includes misrepresentation, is the subject of a separate plea, and undue influence as a term used in a plea in this court raises the question of coercion, and that only.

I now proceed to examine the evidence, upon the assumption that the defendant was bound to prove the issue he raised, and that it was necessary for him to establish affirmatively by such evidence as the jury could reasonably act upon, that the residuary clause of this will was obtained by the coercion of the plaintiff. And upon this assumption the question is, Whether the evidence which the defendant gave ought to have been submitted to the jury? The argument on this head betrayed, I think,

some confusion as to the nature and limits of the question, whether there is in any case evidence for the jury. For instance, it was urged as each separate fact or piece of evidence came to be commented upon, that it was not for the court but the jury to assign its due value to such fact or evidence. If this were so it would be unjustifiable for the judge in any case to withdraw the evidence, however slight, or even irrelevant, from the jury. For to ascertain that it is slight or irrelevant the judge must assign a meaning and a value to it, and this might not be the same value or meaning which it would bear in the eyes of the jury. I conceive, therefore, that in judging whether there is in any case evidence for a jury, the judge must weigh the evidence given, and must assign what he conceives to be the most favorable meaning which can reasonably be attributed to any ambiguous statements, and determine on the whole what tendency the evidence has to establish the issue.

Again, it was argued that there were certain facts in this case calculated to give rise to serious suspicions, and it seemed to be contended that any conclusions which might suggest themselves by way of suspicion merely, however vague, might properly, if the jury pleased to indulge in them, form the basis of a verdict; and consequently that if facts were proved calculated to generate such suspicions, enough had been done to make a case fit to go to the jury. If this proposition were correct, it would follow that the defendant had nothing more to do in a case like the present than to prove that the plaintiff was a Catholic priest, that he was the confessor of the testatrix, and that she had made him her residuary legatee. For, upon this basis of fact, suspicion freely indulged and directed by eloquent comment might easily build up the fabric of undue influence or even fraud. It is not intended to be said that he upon whom the burden of proving an issue lies is bound to prove every fact or conclusion of fact upon which the issue depends. From every fact that is proved legitimate and reasonable inferences may of course be drawn, and all that is fairly deducible from the evidence is as much proved for the purpose of a *prima facie* case as if it had been proved directly. I conceive, therefore, that in discussing whether there is in any case evidence to go to the jury, what the court has to consider is this, whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue.

I have been thus far particular in endeavoring to draw the line between that which rests upon proof, and that which rests on supicion only, because in this case I thought the defendant's argument wholly confounded them. The propositions which he was bound to give reasonable evidence to establish were these: that the plaintiff had interfered in the making of the will, that he had procured the gift of the residue to himself, and that he had brought this about not by persuasion and advice (for that would be perfectly legal), but by some coercion or dominion exercised over the testatrix against her will or by

importunity so strong that it could not be resisted. I have looked through the evidence in vain to find reasonable proof of any one of these three propositions. As regards the making of the will the defendant took a most unusual course. For the sake of having the first and last word with the jury, he withdrew the pleas which would have put the plaintiff on proof of the will, and gave no evidence of its execution himself. The consequence was that the attorney, who received the instructions from the testatrix, who made the will, and who, it must be presumed, knew the circumstances under which it was made, and the reasons upon which the testatrix acted so far as she allowed them to be known, was not called as a witness; nor were the attesting witnesses, nor was their place supplied by any other evidence. The making of the will and everything connected with it was left an absolute blank. Literally the only proof which was offered to show that the plaintiff had anything to do with it, consisted in the fact that he was in London about the time that the will bears date, that he and the testatrix were seen together at the house of a relation of his, and that they were also seen at the exhibition. Whether the plaintiff knew what the testatrix had done for him in the will, is a point to which much cross-examination and much argument was directed. He denied it, but admitted many things from which a doubt of his denial may be inferred. But in my mind this matter is immaterial. The fact of his knowing the contents of the will after it was made is some proof that he was in the testatrix's confidence, but it has no tendency, as it seems to me, to support the conclusion that he had himself interfered in the making of it.

It is at this point of proving the plaintiff's interference that the evidence wholly fails. But that I may not do the defendant any injustice, I will recapitulate the whole of what was proved on this head. The plaintiff was the confessor of the testatrix. He knew, from what she told him, that she probably had power over the disposition of the estate in case of her stepson's death before her, and advised her to consult a lawyer. She asked for the name of the Roman Catholic bishop's attorney, and he told her. This attorney was the person who afterwards in London made the will. She told the plaintiff at some time that she had made him her executor, and had given him full powers. He remonstrated against his being her sole executor, to which she replied, "You villain! whom else have I to trust?" The plaintiff admitted that he had heard that Mr. Cooper, also a Roman Catholic priest, was originally intended to be executor and residuary legatee, but that he (the plaintiff) had been put in his place. The testatrix mentioned to the plaintiff from time to time legacies that she wished paid, and the plaintiff made entry of them on a piece of paper in Greek characters, that they might not be read by any one about the house. Those legacies were not inserted in the will of 1868, which was made after two of them at least had been thus noted by the plaintiff. There is not a single fact in this enumeration, as it seems to me, which is not quite as consistent with the testatrix having told the plaintiff what she had

done, after she had done it, as with the plaintiff having had any hand in doing it; and it would, I think, defy ingenuity to demonstrate that from any one of these facts a reasonable or logical conclusion could be drawn that the plaintiff had a hand in making the will.

But if the evidence fails thus signally to establish the first proposition, with what pretence of reason can it be held to support this much larger proposition, namely, that the plaintiff not only advised the residue to be left to himself, but forced this disposition upon the unwilling testatrix? And yet that is what the defendant has undertaken to prove. No amount of persuasion or advice, whether founded on feelings of regard or religious sentiment, would avail, according to the existing law, to set aside this will, so long as the free volition of the testatrix to accept or reject that advice was not invaded. And what, it must therefore be asked, is the proof that any attempt ever was made to control her free will? There was not a fact, a word, or an event proved which showed that on any occasion the testatrix had subordinated her own will to that of the plaintiff. It was stated, indeed, that he managed her affairs for her; but even this was confined to the last three years of her life, many years after the date of the will, and at a time when her health had failed. But of evidence to show that, in the common affairs of life, or in business, or anything else, she was under the plaintiff's dominion, there was an absolute and total dearth. The only fact that pointed to her having been ever controlled by anybody in anything, was this that when asked by Miss O'Rourke why she did not tell Mr. De Ruffière that she had power to devise the estate, she replied, "They won't let me." At this time she had consulted her attorney, Mr. English, and perhaps Mr. Ward, and she had been in communication also with her stepson, Mr. Conolly, for he spoke of what he expected she would do with the property; and for aught that is known she had consulted other persons; and yet these words, "They won't let me," were argued to establish the following chain of reasoning. Some one had told her not to tell Mr. De Ruffière; therefore the plaintiff was the person who had done so. She wished to tell Mr. De Ruffière; therefore the person who gave the advice controlled her. If he controlled her in this, he must have controlled her in all other things; therefore he controlled her in making a will; therefore he controlled her in leaving the residue to himself. Unless this reasoning is satisfactory, there is not only no evidence of this control, upon which everything turns, but there was hardly an attempt to establish it. The plaintiff had lived in the house with the testatrix for years, and any control of his over her, if it existed, must have been visible to servants or some of the numerous friends who visited at the house. The defendant himself and his wife were called as witnesses, and had been frequently visiting at the house; and yet no question was asked them on the subject. Miss Martin, a friend and visitor, was also called, but not a question was asked her upon it. The only other witness was Miss O'Rourke. She had lived a year with the testatrix in 1856, visited her again for weeks in 1860, again in 1862,

and again in 1866; and even of her no questions were asked by the defendant's counsel as to any dominion exercised in anything, however serious or however trivial, by the plaintiff. But she was cross-examined upon it, and then she said the testatrix was a clever person, who had a pretty firm will of her own, and that she never saw anything which led her to believe that the plaintiff ever induced her to do anything which she did not wish to do of her own accord. No other visitor, friend, or servant was produced, and the case was actually closed without a question being put by the defendant's counsel to any witness as to the existence of a dominating influence on the part of the plaintiff over the testatrix, either in relation to her testamentary dispositions or anything else. Then in the last resort the defendant called the plaintiff himself, and was allowed to cross-examine him; and, strange as it may appear, no instances or occasions were put to the plaintiff on which he was alleged to have controlled the testatrix, and he was allowed to leave the witness-box without being challenged to admit any facts from which the habitual exercise of dominion might be inferred. Unless, therefore, it is just and right to conclude in all cases that a Roman Catholic priest, holding the position of confessor, must be held to possess and exert over those whom he confesses such a dominion as to extinguish their free will in the disposition of their property, there were no materials, in my opinion, from which such a conclusion could be drawn in the present case, and therefore no evidence for the jury.

There remains one fact to be noticed. The testatrix is proved to have told her niece, Miss O'Rourke, that if she wished to leave money for the saying of masses, or other purposes of religion, she must not express her trusts in her will, but leave the money to her confessor, and tell him privately what she wished. This statement greatly strengthens the suspicion to which the general facts of the case are calculated to give rise, that this devise of the residue to the plaintiff was in reality accompanied by some secret trust for religious purposes. Whether there be such a trust in this case it is not for this court to investigate. Whether the possibility of such trusts existing, and eluding the power of courts of justice to drag them to light, ought or ought not to induce the legislature to place any new restraints upon bequests or devises for ministers of religion, it is not for this court to suggest, still less to assert. But one thing is plain; if this testatrix really did intend her property to be applied for the saying of masses, or for charities or other religious objects, and confided in her confessor to see that her objects were attained, she was, in the making of this will, carrying out her own wishes; she was intent on achieving an end of her own for the ease of her own mind, and was obeying the impulses of her own religious faith, all of which is hardly consistent with the notion of her having acted under the dictation of another.

The rule will be discharged with costs.

(His Lordship further stated that Mr. Justice Brett concurred in this judgment entirely, both in reference to the law and as to the facts,

and that Mr. Baron Pigott also concurred, but with hesitation. He regarded the whole case as full of suspicion and mystery. His doubts arose only as to the effect of the evidence, and he quite agreed in the directions it contains on the point of law.)

Rule discharged.[1]

WINGROVE *v.* WINGROVE.

Probate Division. 1885.

[*Reported* 11 *P. D.* 81.]

The plaintiff as a legatee propounded a will dated the 15th of September, 1869, of Elizabeth Wingrove, late of 87 Long Lane, West Smithfield, and alleged that a codicil dated the 9th of October, 1880, which revoked some of the gifts to him, was procured by the undue influence of the defendants. The defendants in the statement of defence denied that the codicil was procured by undue influence, and claimed probate of it together with the will. The action had been tried by a common jury, who found a verdict for the plaintiff, which was subsequently set aside and a new trial ordered by a special jury.

Murphy, Q. C., and *Gye*, appeared for the plaintiff, and

Inderwick, Q. C., and *Pritchard*, for the defendants, in the second trial.

The burden of proving the undue influence being upon the plaintiff, his counsel opened the case.

Sir James Hannen (President), in addressing the jury said: Gentlemen of the jury, I must ask your particular attention to the exposition which I am about to give you of the law upon this subject of undue influence, for I find, from now a long experience in this court, that there is no subject upon which there is a greater misapprehension.

The misapprehension to which I have referred arises from the particular form of the expression. We are all familiar with the use of the word "influence;" we say that one person has an unbounded influence over another, and we speak of evil influences and good influences; but it is not because one person has unbounded influence over another that therefore when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word. To give you some illustrations of what I mean, a young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favor, to the exclusion of his relatives. It is unfortunately quite natural that a man so entangled should yield to that influence and confer large bounties on the person with whom he has been brought

[1] Some American courts hold that the doctrines of equity as to gifts *inter vivos* should be applied to wills. *Morris* v. *Stokes*, 21 Ga. 552, 575 (1857); *Meek* v. *Perry*, 36 Miss. 190, 252 (1858); *Garvin* v. *Williams*, 44 Mo. 465 (1869); *Moore* v. *Spier*, 80 Ala. 129 (1885).

into such relation; yet the law does not attempt to guard against those contingencies. A man may be the companion of another, and may encourage him in evil courses, and so obtain what is called an undue influence over him, and the consequence may be a will made in his favor. But that again, shocking as it is, perhaps even worse than the other, will not amount to undue influence.

To be undue influence in the eye of the law there must be — to sum it up in a word — coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she will make a will in a particular person's favor, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence.

The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion, though not actual violence.

These illustrations will sufficiently bring home to your minds that even very immoral considerations either on the part of the testator, or of some one else offering them, do not amount to undue influence unless the testator is in such a condition, that if he could speak his wishes to the last, he would say, "This is not my wish, but I must do it."

If therefore the act is shown to be the result of the wish and will of the testator at the time, then, however it has been brought about — for we are not dealing with a case of fraud — though you may condemn the testator for having such a wish, though you may condemn any person who has endeavored to persuade and has succeeded in persuading the testator to adopt that view — still it is not undue influence.

There remains another general observation that I must make, and it is this, that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power, that the will such as it is, has been produced.

DOWNEY *v.* MURPHY.

SUPREME COURT OF NORTH CAROLINA. 1834.

[*Reported* 1 *Dev. & B.* 82.]

THIS was an issue of *Devisavit vel non* as to a script produced by the plaintiff as the will of John G. Smith.[1]

On the trial before *Norwood*, J., at Granville, on the last Spring Circuit, the plaintiff having made out a *prima facie* case, by proof of the formal execution of the supposed will, for the defendants, the caveators, it was objected, that the deceased, at its execution, was not of perfect memory, and if he had been, that he was at its execution weak in body and mind, and *in extremis*, and that the execution by the supposed testator was, under these circumstances, procured by the fraudulent practices of the plaintiff, who was the executor, and took a large beneficial interest under the supposed will.

Upon the issue much testimony was offered by both parties. It was alleged by the defendants, that the supposed will never had been read over to or by the testator; to establish the contrary, the plaintiff, among other things, endeavored to prove, that an interlineation near the end of the paper, was in the handwriting of the deceased. The deceased, when in health, was a man of a clear head, an acute intellect, and of decided business habits; but at the time of the execution of the will was laboring under a lingering disease, which had prostrated his physical powers, and had affected his understanding, as was contended by the defendants.

It was admitted that the will was in the handwriting of the plaintiff, who was a favorite nephew and confidential agent of the deceased; but it was contended that it was written from instructions given by the deceased.

His Honor, in his charge to the jury, informed them, that in order to the validity of a will, the testator must have a sound and disposing mind and memory; but that though his mind might be weakened or impaired from age and bodily infirmity, still if he retained intellect enough to make a rational disposition of his estate, it was sufficient: that as with a deed, so with a will, in general, if executed by the party, it was sufficient, though not read over, or the contents thereof shown to be known to him — the act of execution recognizing and adopting the instrument. But that there might be circumstances which would require a different rule; that a will being written by a legatee, was looked upon as a suspicious circumstance, the suspicion being greater or less according as the interest was greater or smaller; and that where a will was written by one taking a large and beneficial interest under it, for a testator, in his last illness, and under great

[1] Part of the case is omitted.

weakness from disease, and the writer was a confidential agent and adviser of the testator, it was necessary, in support of the will, to produce some evidence to show a knowledge by the testator of its contents, as that it was read to him or by him; or if not so read, proof that it was written from instructions by the testator, and according to them, would be sufficient, as showing that he knew the contents; that for this purpose the testimony as to the interlineation being in the handwriting of the deceased was submitted to them, and if in his handwriting, it would be important evidence; the evidence and the inference to be drawn from it, was for them.

A verdict was returned for the caveators, and the plaintiff appealed.

Iredell and *Devereux*, for the will.

Nash and *Badger*, contra.

Ruffin, C. J. [considered the questions of evidence, the statement of which has been omitted, and then continued thus:] Having considered these points, that which arises upon the instructions to the jury is next presented. It is one of much importance, both in its bearing upon the interests of these parties, and as a general question of law. His Honor first stated to the jury, as we conceive, correctly, that to the validity of a will a disposing capacity was necessary, and a knowledge of the contents of the instrument; and that in point of law, such a knowledge was presumed from the fact of execution, if the capacity was satisfactorily established. But he further stated, there were cases which required a different rule; and, applying the exception to the case before him, he proceeded to lay down these principles to the jury: That a will being written by a legatee was in law a suspicious circumstance; the suspicion being greater or less in proportion to the interest; that when a will was written, by one taking a large and beneficial interest, for a testator in his last illness, and great weakness from disease, and the writer was a confidential agent and adviser of the supposed testator, it was necessary in support of the will, to produce some evidence to show a knowledge by the testator of the contents of the will, as that it was read to him, or by him, or, if not so read, that it was written from instructions and according to them, which would be sufficient.

The instructions assume that in point of law, the validity of the will depends upon such proof; and that in such a case, the inquiry is not one of fact, whether the maker of the instrument actually knew, or was actually ignorant of the contents of the paper; but is an inference of law, either that he did not know them, or that it does not appear, and it ought to appear, by plain proof, that he did know them. The correctness of the instructions depends therefore upon the inquiry, whether by the laws of this State, these are inferences of fact to be drawn by the jury, or are to be stated by the court as fixed legal principles.

In support of the opinion of the court, many cases have been read from the ecclesiastical courts of England; in which the rules laid down

to the jury are stated as *rules* or *principles*, which govern those courts. But those cases and the terms in which the judges deliver themselves, are far from satisfying us, that the nature of the inquiry makes it, in a court of common law, the province of the judge and not the jury to determine it. The Court of Probate in England decides every question both of law and fact, which the case presents; the capacity of the testator, in all its various gradations as perfect, doubtful and defective. Where of the last kind, the instrument is necessarily inoperative under all circumstances. But where a testable capacity is found, the degree of proof that the instrument was freely executed, and that its provisions were really assented to by the maker, must necessarily vary with the degree of capacity, in order to satisfy a rational mind, that there was such free agency, knowledge and assent as the law demands. That tribunals such as the ecclesiastical courts, constituted of a single judge, holding the court permanently, and deciding the whole case, should, in the course of repeated discussions of evidence of a similar kind, adopt, for the ease of the court, and for the information of suitors, some propositions, as the measure of that proof, to be deemed sufficient or insufficient under particular circumstances, is not surprising. To the usefulness of such a court, such rules, as *principles* for the government of the judge, are indispensable. They are requisite, both to relieve the judge from unnecessary *labor*, and to exclude the suspicion and the danger of unlimited and irresponsible discretion upon all questions of fact; which in a permanent magistrate is intolerable. Hence, in the very able opinions which have been delivered by the judges of those courts, are constantly found expositions of the reasons on which the credit to be given to the witnesses ought to rest, and on which inferences of particular facts may be rationally drawn from certain evidence; and such reasons, and the determination to which they led in one case, are naturally appealed to by counsel, and acknowleged by the court in succeeding cases. At first they may be respected only as the conclusions of an able, well-instructed and experienced mind, well calculated to influence another mind to adopt the same conclusions. But they soon acquire the authority which a succeeding judge is neither able nor willing to deny to them, of being *precedents*. For, as has been forcibly remarked, it is the professional tendency to repose on precedents; and it is fortunate for the institutions of every country, that there is such a tendency.

That the principles upon which the Ordinary in England requires particular proof, to rebut the presumption of fraud in obtaining a will from a man of weak or impaired faculties, are obligatory upon each succeeding judge who may sit in those courts, seems to be a settled point in those courts. Nor can it be denied that those principles have been most carefully considered and cautiously settled. They address themselves forcibly to every rational mind; and were most properly urged against the instrument offered for probate in this case. The court is not to be understood as pronouncing them insufficient to repel

all the presumptions drawn from the execution of the instrument by a testator in the condition of mind and body imputed to Mr. Smith by the witnesses. Upon its sufficiency or insufficiency this court would carefully abstain from intimating any opinion; and allusion is made to it, only to prevent the supposition, that our decision rests on a difference of opinion between us and His Honor upon the weight to which the evidence was entitled. On the contrary, we think the question is, whether either court can determine its weight; in other words, whether the inquiry be one of fact or law. That question cannot be determined by the decisions of the ecclesiastical courts, for whether the nature of the inquiry be of the one kind or of the other, the remarks, rules, principles, by which one great judge was guided in the discussion, weighing and deciding on evidence of a particular character, in a particular case, would be authoritative on another upon the like evidence in a like case. The question depends upon the nature of the inquiry according to the common law of England, and the Statute laws of this State. For although the question is one of probate, and therefore might appropriately be governed by that portion of the ecclesiastical law which is incorporated into the common law and administered in peculiar jurisdictions; yet it has seemed good to the legislature to refer it to a tribunal of a different nature, a jury. That tribunal is the favorite of the common law as the arbiter of facts; and not less so with the legislature of this State than with our ancestors. For not only is the decision of all facts within the power of a jury, but in this State it is exclusively their province to decide them, uninfluenced by the opinion of the judge upon the weight of the evidence, or its sufficiency to prove any fact in dispute. To the jury any argument may be urged impugning, or enforcing deductions of one fact from another proved, or from the defect of full proof of either the one fact or the other; and the opinions of men of able and practised minds may properly be laid before them in argument, as likely to influence their judgment by the force of the reasoning which led to those opinions, or by the authority of the opinions themselves, coming from such sources. But it is impossible to say, that such a tribunal is bound as to a conclusion of fact, by the precedent set by another tribunal for the decision of facts, whether consisting of a single judge, or of the numerous judges who compose a jury. There is no *law* to such a body but its conclusions upon the evidence as to the fact sought.

Is there a principle to be found laid down anywhere in the common law, as a positive precept, that *it is necessary* to the validity of the will of a man, written in his last illness, and when very weak from disease, by one who takes a large legacy under it, and was the confidential friend and adviser of the alleged testator, that those who offer the will should distinctly prove, besides the testable capacity of the maker, and the due formal execution of the instrument, the further facts, by distinct evidence, that the maker knew and approved of the contents of the instrument? If there be such a proposition, it has escaped our researches

among the treasures of the common law. It is the principle of that code, that a paper obtained by duress or undue influence, or by deception, and without the free consent of the maker, given upon a knowledge of its provisions, is not a will. But that the want of such knowledge and consent are legal conclusions from evidence that the supposed testator was worn down by disease, and that the writer of the paper derives a large benefit under it, is nowhere found; nor that the like conclusion is absolutely to be drawn from those facts, with the additional one, that the writer was or was not a stranger or a confidential friend of the testator. After proof of capacity and execution, the common law lays down no rule upon the subject; but submits the general question to the jury for a decision, according to their conclusions upon the actual facts of undue influence, imposition on the testator, his knowledge of the contents of the paper, and assent thereto — under the comprehensive inquiry, whether a fraud has been practised. Where the testator's situation is such as to render the perpetration of a fraud easily practicable, the jury may say, they are not satisfied one was not practised, and thence infer its existence, unless the contrary be clearly shown. It is in the power of the jury, and may, as reasonable men, be their duty, for fear of fraudulent practices, and in prevention of them, to find a fraud, or to give a verdict such as they would if they had found a fraud, where there is a defect of proof to negative it. It is upon that principle, that ecclesiastical judges regulate their judgments, as we understand them. But those are conclusions of fact, arising from evidence given or withheld. A *defect of proof*, unless it be a *total* defect, is for the consideration of the jury, wherever the law requires the intervention of a jury. The ecclesiastical judge can say, a case is not established, because it is reasonable to require in the particular case full proof, and to such and such points the proof is not full. So may a jury. But a judge, under our system of jurisprudence, cannot determine, when *prima facie* proof is offered, that the case fails, because further proof is not given. That the will was written by a legatee — that he stood in the relation of kindred, friend, or agent to the party, do not, of themselves, prove that the testator did not know or assent to the dispositions. They raise a suspicion of imposition, and make it reasonable to call for explanations. Such explanations may be given, as acknowledged in these very instructions, by evidence of the actual reading of the will by or to the testator, or by proving its conformity to the instructions given for it. There are other circumstances equally satisfactory; such as the conformity of the will to previous or subsequent declarations, or to such dispositions as the party would be prompted by natural affection to make. The intimacy of the relation between the writer and the testator may be, and is even less suspicious, than if they were strangers; upon the supposition that each draftsman writes himself heir. These considerations must satisfy the mind, that upon such a subject, the law cannot lay down as a test, that a will is, or is not, valid, when executed under any one or more of the particular

circumstances mentioned; but necessarily refers the facts upon which its validity legally depends, to the decision of the jury, under evidence as to all the circumstances attending its preparation or execution, the condition, mental and physical, of the testator, the contents of the instrument, and the benefits provided in it for those actively concerned either in the preparation or execution. Evidence to each of these points may have an important bearing upon the just conclusions to be formed of the testator's capacity, and of the advantages that may have been taken of his weakness or confidence; and a jury may justly be alarmed at the danger of exposing testators to importunities and imposition, which would follow from establishing papers to be wills, when obtained *in extremis*, and under suspicious circumstances, unless those suspicions be removed by affirmative and plenary evidence, that the testator comprehended the dispositions made for him, and fully and freely sanctioned them. But like other questions of actual intention; of the state of the mind; of influence; knowledge or ignorance of one person, and of integrity or dishonesty and fraud of another; this question is one of fact, to be decided by the jury upon evidence; which, in the opinion of the judge, is competent, as tending to establish any of those facts. Its tendency, it is the province of the judge to explain, by stating what conclusions may be drawn from it; but whether it establishes a fact, or whether a conclusion deducible from it, is or is not rebutted by other evidence, is the province of the jury to say.

That the rules of the ecclesiastical courts, although most sensible deductions of facts, are not parts of the law of this country, but only of the law of those courts, we deduce, not only from the manner in which the judges in those tribunals speak upon this question, but from the nature of the subject itself. But furthermore, the questions which arise before the ecclesiastical courts upon the probate of testaments, arise also in the courts of common law, in ejectments on devises, or on issues out of chancery, to try the validity of the will. Yet none of the principles on which the Ordinary makes deductions from evidence given or withheld, have been incorporated into the common law, so as to be laid down to the jury, as conclusions drawn from them. The evidence is submitted to them, that they may draw their own conclusion. For this very reason, the chancellor will not determine the validity of the will, but always sends it to an issue, *devisavit vel non;* and upon that issue and in ejectment, the verdict is frequently at variance with the judgment of the ecclesiastical judge on the same instrument, offered in his court as a testament.

For these reasons, we think there was error in stating it as a proposition of law, that the evidence supposed was necessary to the validity of the paper as a will. It should have been left to the jury to say, whether they thought, from the evidence given, that the presumption from execution, that the party knew the contents of the paper, understood them, and assented to them, was in fact rebutted by the state of his mind and health at the time the will was prepared and executed;

by its contents, and by the circumstances relied on by the defendant; or was confirmed by its contents and by the evidence to the testator's knowledge of them, and other circumstances offered on the other side. The case must therefore be submitted again to the jury.

Per curiam. *Judgment reversed.*[1]

C. *Mistake.*

ANONYMOUS.

COMMON PLEAS. 1587.

[*Reported Godb.* 131, *pl.* 149.]

IT was holden by Anderson, C. J., that if one deviseth lands to the heirs of I. S. and the clerk writes it to I. S. and his heirs, that the same may be holpen by averment, because the intent of the devisor is written, and more; and it shall be nought for that which is against his intent, and against his will, and good for the residue. But if a devise be to I. S. and his heirs, and it is written but to the heirs of I. S. there an averment shall not make it good to I. S. because it is not in writing, which the Statute requires; and so an averment to take away surplusage is good, but not to increase that which is defective in the will of the testator.

BROWN *v.* SELWIN.

CHANCERY. 1734.

[*Reported Cas. temp. Talb.* 240.]

JOHN BROWN, on the 23d of June, 1732, made his will, and thereby bequeathed to the plaintiff a legacy of £500 and all his plate; to the defendant he gave all his leasehold messuages; and after several other legacies and bequests, as well as devising some freehold and copyhold lands, he devised as follows: "and as for the rest, residue and remainder of my estate, whether real or personal, whereof I am seised or possessed, or which I am any ways entitled to, which I have not herein and hereby devised, given, &c., I give and bequeath the same,

[1] See *Wright* v. *Howe*, 7 Jones, 412 (1860), where the scrivener and sole legatee was the testatrix's attorney; *Cramer* v. *Crumbaugh*, 3 Md. 491 (1853); *Stirling* v. *Stirling*, 64 Md. 138 (1885); *Booth* v. *Kitchen*, 3 Redf. 52 (1877); *Post* v. *Mason*, 91 N. Y. 539 (1883); *Carter* v. *Dixon*, 69 Ga. 82 (1882). But in *Hughes* v. *Meredith*, 24 Ga. 325 (1858), it was said that when the scrivener, not being of kin to the testator, takes a large interest under the will, the presumption of law is that the testator does not know the contents of the will. Cf. *Yardley* v. *Cuthbertson*, 108 Pa. 395 (1885); *Blume* v. *Hartman*, 115 Pa. 32 (1886); and earlier Pennsylvania decisions referred to in those cases.

and every part thereof, and all my right, title and interest therein and thereto, unto such my executor or executors hereinafter named, as shall duly take on him or them the execution of this my will, according to the true intent and meaning thereof, his or their heirs, executors, administrators and assigns, as tenants in common, and not as joint tenants;" and afterwards appointed the plaintiff and defendant his executors, and soon after died; and the plaintiff and defendant proved the will. The defendant was at the time of the testator's death indebted to the testator in £3000 principal money, besides interest, and for securing thereof had given a bond to the testator, dated the 20th of June, 1732, in £6000 penalty: the bill was brought that the defendant might account with the plaintiff for the testator's residuary estate, and pay him a moiety of the said £3000 and interest; and the cross bill was to have the bond delivered to be cancelled.

It appeared by the answer of the defendant in the original cause, and by the proofs in both causes, that the testator designed to give this money to the defendant; and gave one Viner, the attorney concerned in drawing the will, instructions in writing accordingly; but Viner refused to make mention of it in the will, insisting that the bond would be extinguished and released of course by Mr. Selwin's being appointed executor; but the testator appearing dissatisfied with Viner's opinion, a case was stated for counsel's opinion, who confirmed what Viner said: in confidence of which the testator signed and published his will, with full persuasion that the bond would be extinguished; and this appeared clearly to be the intention of the testator.

Lord Chancellor. [Lord Talbot.] The question is, whether £3000 which was due to the testator from Mr. Selwin, shall pass to Mr. Selwin by his being made executor; or, whether it passed by the devise of the residue to the two executors. The written instructions for drawing the will directs the £3000 all to Mr. Selwin. The attorney who was to draw the will says it was the testator's intention it should go so; but that he, apprehending that making the obligor executor was an extinguishment of the debt, hindered it from being particularly mentioned. It was never doubted but a debt due from an executor to a testator shall be assets in the executor's hands to pay debts; for, if the testator had expressly given it away, even that could not have screened it from debts: so the testator may give a legacy out of a debt due to him, as in the case in Yelv. 160, *Flud* v. *Rumsey*, which authority is right; the implied gift, by making the debtor executor, may be controlled by an express gift, or by a devise of all his debts.

It hath been questioned whether such a debt be assets to pay legacies in general; but that not being the present case, it is not necessary to be determined: I am at present inclined to think it may; but shall not bind myself by giving my opinion till the case happens. If this be considered upon the will, without the parol evidence, it will appear clearly from the general words of devising the residue, *i. e.*, *all his real*

and personal estate which he had not thereby before given to the residuary legatees; that this debt, which at that time was part of the personal estate, falls within the description: the testator was entitled to this debt when he made his will, and at the time of his death; he had not before disposed of it, nor had he appointed Mr. Selwin executor. A devise of the residue after payment of debts and legacies plainly comprehends this debt; and the only doubt is with regard to Mr. Viner's evidence, who wrote the will. I privately think that it was intended the £3000 should go to Mr. Selwin. Privately I think so; but I am not at liberty, by private opinion, to make a construction against the plain words of a will. None of the cases where parol evidence has been admitted have gone so far as the present case; the farthest they go is to rebut an equity or resulting trust; the parol evidence in those cases tended to support the intention of the testator consistent with the written will, and did not contradict the express words of the will, as in the present case. It is better to suffer a particular mischief than a general inconvenience, and so reversed the decree, and ordered Mr. Selwin to account with the plaintiff Brown for the said £3000, but no costs.

This was upon an appeal from the Rolls.

This cause, the 26th of March, 1735, came before the House of Lords upon an appeal, and the Lord Chancellor's decree was affirmed: and the Lords would not allow the parol evidence to be read, nor even the respondent's answer as to these matters.[1]

[1] See *Iddings* v. *Iddings*, 7 S. & R. 111 (1821); *Chappel* v. *Avery*, 6 Conn. 31 (1825).

"When a testamentary instrument offered for probate is executed and attested as required by Statute, and has not been revoked or cancelled, only three questions can arise: 1st. Was the testator, at the time of executing the instrument, of sound and disposing mind and memory, capable of understanding the nature of the act he was doing and the relation in which he stood to the objects of his bounty and to the persons to whom the law would have given his property if he had died intestate? 2d. Was the instrument executed under fraud or undue influence, by which his own intentions were controlled and supplanted by those of another person? 3d. Did he execute the instrument *animo testandi*, with an understanding and purpose that it should be his last will and testament? . . .

"In a court of probate, it may doubtless be shown by parol evidence that the alleged testator, at the time of signing the instrument, did not understand that it was a will, or intend that it should operate as such. *Swett* v. *Boardman*, 1 Mass. 258. *Osborn* v. *Cook*, 11 Cush. 532, 535. But if, being of sufficient mental capacity, and free from insane delusion or undue influence, he executed the instrument with a knowledge of its nature and contents, and intending that it should be his last will, its admission to probate cannot be opposed by evidence that he did not understand the legal effect of all its provisions, or truly appreciate the proportions in which his property would be thereby distributed. To allow this to be done would be to defeat, by evidence of the most unsatisfactory and untrustworthy character, an instrument voluntarily executed by a competent testator with all the forms and solemnities which the Statute makes essential to the validity of a testamentary disposition." — *Per* GRAY, J., in *Barker* v. *Comins*, 110 Mass. 477, 487, 488 (1872).

See *McAlister* v. *Butterfield*, 31 Ind. 25 (1869).

But cf. *Burger* v. *Hill*, 1 Bradf. 360 (1850).

BLACKWOOD *v.* DAMER.

COURT OF DELEGATES. 1783.

[*Reported* 3 *Phillim.* 458, *n.*]

M. JANSSEN wrote with his own hand instructions for a will, in which he left the residuum to his youngest daughter, since married to the Honorable Lionel Damer. The attorney, in writing over the will, omitted the residuary clause; some other variations were made; the draft was read over to the testator, and left in his custody two days; the will was executed in due form — contained legacies to the executors. The testator always afterwards expressed himself as having left the residuum to his youngest daughter. The attorney deposed, that it was merely an omission: the other variations he supposed he had received verbal instructions to make.

The court below had pronounced for the instructions as part of the will.

The delegates decreed that the residuary clause should stand as part of the will, but no other part of the instructions.

DELEGATES, *Mr. Justice Willes*, *Mr. Baron Eyre*, *Mr. Justice Nares*, and *Dr. Macham*.[1]

NEWBURGH *v.* NEWBURGH.

CHANCERY. 1820.

[*Reported* 5 *Mad.* 364.]

THE late Earl of Newburgh, having estates in the counties of Sussex, Gloucester, and elsewhere, gave instructions to his solicitor to prepare a will, which *inter alia* was to give to his wife, the Countess Dowager of Newburgh, an estate for life in his estates in the counties of Sussex and Gloucester. The solicitor prepared a will in writing accordingly, and the same was afterwards laid before an eminent conveyancer to settle. By some accident, the word "Gloucester" was struck out by the conveyancer, and the person who made the fair copy of the will, changed the word "counties" into "county," and the will, as fairly copied, omitted therefore altogether the estate for life to the Countess Dowager, in the county of Gloucester.

At the time Lord Newburgh executed the will, the solicitor who attended the execution had with him the abstract of the will as originally prepared, and the will was not itself read, but this abstract, which represented that a life estate was given to Lady Newburgh, as well in

[1] *Castell* v. *Fogg*, 1 Curt. 293 (1836), *accord.* See *Fawcett* v. *Jones*, 3 Phillim. 434, 485–487 (1810).

Gloucester as in Sussex; and Lord Newburgh executed the will, believing that it followed the abstract.

The first bill was filed for the execution of the trusts of the will as they actually appeared upon the face of the will. The second bill was by the Countess Dowager of Newburgh, stating the omission of her life estate in Gloucester, and praying that the mistake in that respect might be rectified, and that the trusts of the will might be executed with such correction.

The first question was, whether the evidence on the part of the Countess Dowager of Newburgh could be received for the purpose of correcting the mistake?

The Vice-Chancellor [Sir John Leach] refused the evidence; because, admitting it to be clearly made out that the mistake existed, this court had no authority to correct the will according to the intention. The will executed with that omission was certainly not the will of the devisor, and so it must be found by a jury upon the facts stated as to the Gloucester estate; but the court could not for that reason set up the intention of the testator, which, by mistake, he had been prevented from carrying into execution, as if he had actually executed that intention in the forms prescribed by the Statute of Frauds. To assume such a jurisdiction would, in effect, be to repeal the Statute of Frauds in all cases where a devisor failed to comply with the Statute by mistake or accident, and to operate this repeal, by admitting parol evidence of the intention of the devisor, which it was the very object of the Statute to avoid. — That this case bore no analogy to cases where the devisee or heir prevented another gift in the will, by undertaking to perform it. There, the Statute was in no manner broken in upon; but this court, in respect of the fraud attempted, fastened that trust upon the estate which in equity and conscience attached upon it. — That admitting that voluntary conveyances might be corrected upon the principle, that as between volunteers this court would not permit a claim proceeding upon mistake, as to which two cases were cited; yet this principle had no application to the case of wills, for the difficulty was not that the will was a voluntary instrument, but that there could be no will without the forms of the Statute of Frauds, and the disappointed intention had not those forms. That if any party asked the same, he was ready to direct an issue to try whether this was the will of the testator as to the Gloucester estate, and upon this issue the evidence tendered would be admissible. No such issue was asked; and the case was sent, as to several questions of legal construction, to the Court of King's Bench.

The heir here contended that the omission of Lady N.'s life estate had made the subsequent limitations void as too remote; and it was immaterial to him, if he was right in this point, to try the fact of *devisavit vel non* as to the Gloucester estate. If otherwise, he would have avoided the will as to this estate upon the fact; because a gift immediate is not an execution of the intention to give after a prior life estate,

and the omission of the life estate of Lady N. must therefore have defeated the whole devise as to the Gloucester estate.

I was not present at the argument of the foregoing points, but am informed that, as to this last point, *Mr. Bell* cited a case, not in print, upon the authority of Lord Chief Baron Richards, in which it was considered that Lord Eldon had sent it to a jury to try upon the same description of facts, what was the will of the testator; but whether any such trial had ever taken place was not known.

Mr. Sugden cited *Towers* v. *Moor*, 2 Vernon, 98, in which the same doctrine had been held, as to the Statute of Frauds, as was expressed by the Vice-Chancellor.

The case was afterwards re-heard before the Vice-Chancellor, and it was then suggested, as the result of the conveyancer's evidence, that there was no omission in the will, but that the error was owing to the introduction of a passage which he had first written, and afterwards struck through with a pen, but had been copied by mistake in the fair will; and it was contended there ought, therefore, to be an issue to try whether those words, so introduced by mistake, were part of the will.

The Vice-Chancellor thought that if such a case had been originally made, they would have been entitled to such an issue; but that such case being in direct opposition to the allegations upon the record, he could not entertain it.[1]

[1] "In *Newburgh* v. *Newburgh*, the conveyancer, in settling the will of Lord Newburgh, had struck out by mistake the word 'Gloucester,' in a devise to the wife of the testator's estates in the counties of Sussex and Gloucester, and the word 'counties' was then altered by the copying clerk into 'county;' it was held both by Leach, V. C., and Lord Eldon, C., that parol evidence was inadmissible to prove the mistake. Upon an appeal to the House of Lords the judges were unanimous that the parol evidence could not be received, but the case was ultimately decided by the House upon the true construction of what still appeared on the face of the will. Upon the question of parol evidence I cited for the respondent *Towers* v. *Moor*, 2 Vern. 98; *Seymour* v. *Rapier*, Bunb. 28; *Lord Walpole* v. *Lord Orford*, 3 Ves. 402; 7 T. Rep. 138; *Kelly* v. *Powlett*, Ambl. 605, 1 Bro. C. C. 476; *Doe* v. *Bland*, 11 East, 441; *Harwood* v. *Wallis*, 2 Ves. 195; *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 477; *Brown* v. *Selwin*, For. 240; *Stratton* v. *Best*, 1 Ves. Jun. 285.

"The Vice-Chancellor appears to have thought that the omission of the word 'Gloucester' in the particular devise would avoid the whole will as to Gloucester, although in other passages in the will the estates were regularly devised according to the testator's intention, for although he held that he could not supply the word omitted, yet he said that the will executed with that omission was certainly not the will of the devisor, and so it must be found by a jury upon the facts stated as to the Gloucester estate. He added, that if any party asked the same he was ready to direct an issue to try whether this was the will of the testator as to the Gloucester estate, and upon this issue the evidence tendered would be admissible. This the heir at law declined, because upon the will as it stood, *prima facie* the Gloucester estate was omitted in the devise to Lady Newburgh for life, with many remainders over, including limitations to unborn children in strict settlement, and it was not until failure of all these limitations that there was in express words a devise over of the Gloucester with the other estates,

MITCHELL *v.* GARD.

COURT OF PROBATE. 1862.

[*Reported* 3 *Sw. & Tr.* 75.]

SIR C. CRESSWELL gave the following judgment:[1] In this case the defendants propounded a will alleged to have been made by Mary Gregory, widow. The plaintiffs pleaded — first, that the will was not duly executed; secondly, that the deceased was not of sound mind, memory, and understanding; thirdly, that the paper-writing propounded was not the will of the deceased; fourthly, that the will was obtained by the undue influence of the defendant Gard.

Issues were joined on these pleas, and the cause came on for trial at the last assizes for Exeter, before *Byles*, J., when the jury found,

so that the devise over appeared to be too remote and therefore void. Of course Lady Newburgh sought no such issue, because she wanted an actual devise to her to support her claim. But the Vice-Chancellor in offering such an issue must have been of opinion that the omission of the word 'Gloucester' in the particular devise would render the whole will void as to the Gloucester estate. This, of course, could not be maintained, because, although the will did not contain all that the testator intended as to this estate, it contained in the actual devises of it nothing but what he did intend. And in the result the omission was supplied by construction, and the will was supported just as if there had been no mistake." — *Sugd., Law of Prop.*, 206, 207.

"In the course of the argument in the House of Lords of the case of *Newburgh* v. *Newburgh*, Mr. Heald, for the appellant, was asked by Lord Eldon, C., whether there was any case in which an addition had been made to a will. *Hippisley* v. *Horner* was quoted. The Lord Chancellor said, 'I have known cases in which matter has been struck out of a will improperly inserted in it. If you insert a clause in a will, how are you after his death to have that attested by three witnesses?' Mr. Heald observed that the House would only be required to strike out a clause. Lord Chancellor: 'The cases I allude to were all cases in which it was struck out on the ground of fraud.' In a further part of the argument the Lord Chancellor asked, 'Are you to direct the judge what evidence he is to receive? *Hippisley* v. *Horner* is not worth twopence' (this expression I wrote down at the time it was uttered).

"In the above case of *Newburgh* v. *Newburgh*, Lady Newburgh's cross bill was filed in order to have the word 'Gloucester' supplied, by parol evidence of the mistake. That having failed in the court below, the counsel then discovered that by the *omission* altogether of two lines introduced by Mr. Butler (which were intended to contain an enumeration of all the estates in the term of 2,000 years, but which omitted 'Gloucester,') the will would convey all the estates to Lady Newburgh, according to the intention. But the Vice-Chancellor held that the frame of the bill was in direct opposition to that view of the case. If this view had originally occurred to Lady Newburgh's counsel, and the bill had been adapted to it, evidence would have been tendered to establish the mistake. But this is a dangerous jurisdiction: for although no doubt the striking out of the two lines would have made the will what the testator directed, yet those lines, although inaccurate, were introduced in order to carry the instructions for the will into legal operation. It might on the same ground be contended that a mistake in a legal limitation, made through carelessness or ignorance, could be corrected by striking out the words improperly introduced." — *Id.*, 196, 197.

See *Miller* v. *Travers*, 8 Bing. 244, 254, 255 (1832).

[1] The opinion only is here given.

first, that the will was duly executed; secondly, that the deceased was not of sound mind, memory, and understanding; fourthly, that the will was not obtained by undue influence.

With regard to the third issue, the learned judge put certain questions to the jury suggested by the evidence, which, as far as that issue was affected, was as follows: The testatrix, on Tuesday, the 16th of September, in the morning, gave to the defendant Gard instructions for her will. She named several persons who were to be legatees, and the sums to be given to them respectively, and she made Gard residuary legatee. Gard directed his son, who was in practice as an attorney, to prepare a will according to those instructions, and to do it quickly. The son, in his haste, omitted the name of Triplett as one of the legatees. In the afternoon, Gard, the residuary legatee, took the will to the house of the deceased, and was soon afterwards followed by two medical men. One or more of the legatees named in the will were there, and some conversation took place about two or three other persons, and deceased said that she wished them to have a legacy of £5 each. Gard made a memorandum of this, and said it should be attended to; but the will was not altered. Soon after this all persons, except the two Gards (father and son) and the medical men, left the room. Gard then read over the will slowly and carefully to the deceased; she attended to it, and expressed herself satisfied. Neither she nor Gard noticed the omission of Triplett's name. The will was then duly executed by her, and attested by the medical men. The learned judge told the jury that an accidental and innocent deviation from instructions (as in the case of the legacy to Triplett) would not vitiate a will afterwards executed and rightly understood, or even executed by a competent testator; but, with reference to the omission of the other legacies, he asked the jury whether the instructions for them were present to Gard's mind at the time of the execution of the will, but absent from the mind of the testatrix, and he (Gard) knew them to be so; or whether the testatrix executed the will in the erroneous belief that those legacies had been given by the will, and Gard knew that she did so. The jury found that the testatrix had given instructions to Gard for legacies to Gillard, Perriam, and Egg; that at the time of the execution of the will those instructions were present to his mind; that they were absent from hers, and that he knew them to be so. The learned judge thereupon directed the verdict to be entered for the plaintiffs on the third issue, giving to the defendants leave to move to enter it in their favor. A rule *nisi* for that purpose having been granted, cause was shown against it on the 15th of May, when the cases of *Barry* v. *Butlin*, 2 Moo. P. C. 480; and *Mitchell* v. *Thomas*, 6 Moo. P. C. 137, were cited to show that when a person prepares a will by which he is largely benefited, and the capacity of the testator is at all doubtful, it is necessary to prove that instructions were given by the testator, or that the will was read over to him, or that by some other means he was fully acquainted with its contents.

Those cases have no bearing on the question now to be determined, for the testatrix gave instructions for all that was in the will; it was read over to her, and the jury found that she was of sound mind, memory, and understanding, which is not now disputed. The real question is, whether that which she heard read, and approved, and executed, is or is not her will, because she forgot at the time that she had desired other legacies to be given, which were not inserted. Before the Statute 1 Vict. *c.* 26, many wills were brought under the consideration of the Prerogative Court, when it appeared that they did not contain all that the testator intended. The cases on the subject may be divided into two classes: one, where there was on the face of the will, as executed, some ambiguity or incongruity which indicated that something must have been omitted by mistake, and in them evidence was received of the testator's intention, and the omission supplied. The other class was where there was nothing on the face of the will to indicate that a mistake had been made, and the principle of law applicable to them was very clearly stated by Sir John Nicholl in *Bayldon* v. *Bayldon*, 3 Add. 232. He says: "Where a will has nothing doubtful or incongruous on the face of it, suggesting itself the probability of some casual error to account for this in the body of the will, extrinsic evidence of the testator having meant other than the will expresses is inadmissible, as the court after and notwithstanding such evidence would still be bound to pronounce for the will." And again, in *Shadbolt* v. *Waugh*, 3 Hagg. 573, the same learned judge, with reference to an alleged omission, said, "It may be possible that the non-insertion escaped his observation when the will was read over, but that is not sufficient."

The omission of the legacies therefore did not prevent the will propounded from being the will of the deceased. There is nothing to show that at the time when it was executed she believed it to be other than it really was; as far as this question is concerned, I think it makes no difference whether the legacies were omitted by accident or intentionally, nor can it make any difference that Gard remembered the legacies, and knew that she had forgotten them. But also the will was executed by her intending that it should be her will; if her execution of it had been obtained by fraud, the case would be different. The knowledge of Gard may raise a suspicion against him, but fraud was not pleaded, nor do I learn from the learned judge's notes that it was imputed, nor was any question put to the jury on the subject.

The point reserved must therefore be determined apart from any presumption of fraud, and on the authority of the cases cited, as well as the reason of the thing, I am of opinion that the writing propounded was the will of the testatrix, and that the rule for entering a verdict for the defendants on the third issue must be made absolute.

Mr. Collier, Q. C., *Mr. Coleridge*, Q. C. (*Dr. Wambey* and *Mr. H. C. Lopes* with them) in support of the rule.

Mr. Karslake, Q. C. (*Mr. H. T. Cole* with him), showed cause.

STANLEY *v.* STANLEY.

CHANCERY. 1862.

[*Reported* 2 *J. & H.* 491.]

BILL filed to obtain a declaration as to the construction of the will of Matilda Assheton Smith, and also praying that issues might be directed whether certain words were part of the will.[1]

Thomas Assheton Smith, the husband of the testatrix, died in 1858, seised in fee of real estate of great value in Wales, of a house at Tedworth in the county of Hants and adjoining property, partly in the same county, and partly in the county of Wilts. He devised all his real estate to the testatrix, who was his widow. She died in 1859, leaving a will which contained the following clause: —

"I give and devise my mansion-house at Tedworth in the county of Hants, and all my manors, farms, lands, tenements, and hereditaments *in the county of Hants* devised to me by the said will of my said late husband (subject to the annuities charged thereon by such will, and subject to an additional or further annuity of £50 per annum to be payable to Atwell, the valet of my late husband, during his life as hereinafter mentioned), and all other hereditaments in the said county of Hants of or to which I shall be seised or entitled, or as to or over which I shall have a disposing power by any will at the time of my death (all which hereditaments *in the county of Hants* are hereinafter described or referred to as my Tedworth estate) to the uses and subject to, with, and under the provisos, powers, and devises hereinafter contained."

The bill contained, among other allegations, the following: —

"In giving instructions for the devise of her Tedworth estate, or of the manors, farms, lands, tenements, and hereditaments which in the said will are described as devised to her by the will of her late husband, subject to the amounts charged thereon by such will, the said testatrix did not mention or allude to the county of Hants, and the reference to the said county in the devise was introduced by mistake and without her instructions; and in particular the words *in the county of Hants* as they appear in [certain specified parts of the will, being the portions hereinbefore printed in italics] form no part of the will of the said testatrix."

The bill prayed that a proper issue or proper issues *devisavit vel non*, might be directed as to the said devise, and in particular whether the words *in the county of Hants*, in the places before mentioned, did or did not form part of the will of the said testatrix; and that it might be declared, that, according to the true construction of the will, the

[1] Only that part of the case and opinion which relates to the prayer for issues is given, and a short statement is substituted for that in the report.

whole of the freehold manors and hereditaments, as well in Wilts as in Hants, forming part of the Tedworth estate, were well devised, and were subject to the limitations contained in the will in respect of the hereditaments called "my Tedworth estate."

Evidence was gone into as to the nature and circumstances of the property and of its acquisition, and evidence was also tendered to the effect that the restrictive words "in the county of Hants" formed no part of the instructions, but were introduced by the solicitor under a mistaken impression that the whole estate was in that county.

Mr. Rolt, Q. C., and *Mr. Martindale*, for the plaintiff; and *Sir Hugh Cairns*, Q. C., and *Mr. Lonsdale*, for defendants in the same interest.

Mr. Daniel, Q. C., and *Mr. G. L. Russell*, for the trustees, followed in the same interest.

Mr. Giffard, Q. C., and *Mr. Hobhouse*, for the heir-at-law.

VICE-CHANCELLOR SIR W. PAGE WOOD. This is a bill filed to obtain a declaration as to the construction of the will of Matilda Assheton Smith, and also praying for an issue *devisavit vel non* to ascertain whether certain words formed part of the will of the testatrix.

On the latter point I have felt no hesitation from the first. It is clearly impossible to grant any such issue as the plaintiff asks.

Authorities were cited; among others, *Hippesley* v. *Homer* [T. & R. 48 *n.*], and *Newburgh* v. *Newburgh*, from which it appears that in certain cases the court will direct an issue whether particular words found in the instrument formed part of a testator's will. For the present I will put aside all cases of fraud, and refer only to those where the object has been to strike out some passage from a will on the ground of mistake. In *Powell* v. *Mouchett* [6 Mad. 216], Sir J. Leach laid it down, that it was impossible to have an issue whether a clause was introduced by mistake; but that an issue might be directed whether a particular passage was really a portion of the will, putting as an illustration the case of a manifest interpolation. An issue, for the purpose of ascertaining whether certain words were in the will at the time of its execution, would be very proper. In the present case there is no dispute that the words which the plaintiff desires to strike out were there when the will was executed, and the issue would only be to ascertain whether the solicitor who prepared the will introduced them by mistake. There is no authority for an issue under such circumstances; and, on the other hand, there are some observations of Chief Justice Tindal in *Miller* v. *Travers* [8 Bing. 244], which are extremely pertinent, and, indeed, unanswerable. Referring to a proposal to introduce new words by evidence, the Chief Justice says, "If such evidence is admissible to introduce a new subject-matter of devise, why not also to introduce the name of a devisee altogether omitted in the will? If it is admissible to introduce new matter of devise or a new devisee, why not to strike out such as are contained in the executed will? The effect of such evidence in either case would be, that the will, though

made in form by the testator in his lifetime, would really be made by the attorney after his death; that all the guards intended by the Statute of Frauds would be entirely destroyed and the Statute itself virtually repealed."

If property were devised to A. B. for life, an issue might be asked for the purpose of striking out the words "for life," and converting the interest into a fee simple. This would not be more absurd than striking out restrictive words for the purpose of enlarging the subject-matter of a devise.

[The learned judge then proceeded to the question of construction. This part of the case is omitted.]

GOODS OF DUANE.

COURT OF PROBATE. 1862.

[*Reported* 2 *Sw. & Tr.* 590.]

IN this case the deceased, a sergeant-major in the 64th Regiment of Foot, died on the 3d of October, 1861, having duly executed a testamentary paper by his mark, on the same day. The paper consisted of a skeleton printed form, supplied by the War Office; in the present instance headed, in print: "Form of will, No. 3. To be used by a soldier desirous of leaving money to be invested for the benefit of his child or children;" and, after some printed and some blank lines, with printed directions alongside for particular bequests, it ended in print thus: "And the rest of my estate and effects, and everything that I can give or dispose of, I desire may be sold, and the proceeds invested under the orders of the Secretary of War, for the equal benefit of my children. In witness whereof I the said have hereunto set my hand," etc.

From the affidavit of C. F. F. Wood, a clerk in the military purveyor's department of the War Office, and one of the subscribed witnesses to the mark of the deceased, it appeared that he was sent for on the 3d of October, 1861, to prepare the will for the deceased, who was then in hospital; that he took with him the above-mentioned printed form; but on seeing the deceased, received from him instructions to prepare his will, leaving the whole of the property to his wife; and accordingly, after the printed line, "after payment of my just debts and funeral expenses, I give to my," filled up in writing, "wife, Elizabeth Duane, all my goods and chattels." Wood then read over to the deceased, from the paper so printed and filled up in writing, "This is the last will of Sergeant-Major Thomas Duane, No. 3160, of the 64th Regiment of Foot. After payment of my just debts and funeral expenses, I give to my wife, Elizabeth Duane, all my goods and chattels." He did not read the remainder of the printed form, or advert to it as

having any effect, but filled up the testimonium clause, and the deceased then made his mark.

Dr. Swabey now moved the court to grant letters of administration with the will annexed to the widow, omitting the residuary clause in favor of the children.

Cur. adv. vult.

Sir C. Cresswell, after stating the facts as above, said: *Allen* v. *M'Pherson* [1 H. L. C. 191], decided in the House of Lords, shows that a Court of Probate has authority to omit from probate a clause introduced into a will by fraud, although it formed part of the will when executed. I can see no difference in principle between that case and the present one, where a clause, for which the deceased gave no instructions, and which was not read over to him, formed, *per incuriam*, part of the document signed by the deceased. I think administration with the will annexed may go, omitting the residuary clause in favor of the children.

GUARDHOUSE *v.* BLACKBURN.

Court of Probate. 1866.

[*Reported L. R.* 1 *P. & D.* 109.]

The defendants in this case were the executors under the will and codicil of Mrs. Hannah Jameson, late of Netherton, in Cumberland, who died on the 29th of August, 1863. The plaintiffs were the residuary legatees named in her will. The will was dated the 30th of May, 1851, and the codicil the 13th of April, 1852, and both were proved in common form by the defendants, in October, 1863. The probate had since been called in by the plaintiffs, and the will and codicil were propounded by the defendants in the ordinary declaration.

By the will the testatrix disposed of three different estates, called Folds, Scales, and Stainton; the estate of Scales she charged with legacies to the amount of £500, and that of Stainton with eight legacies of the amount of £100 each. She duly executed a codicil to her will in the following terms: —

"This is a codicil to the will of me Hannah Jameson, of, &c., which will bears date the 30th day of May, 1851. I revoke the bequest of £100 therein made to my nephew, Edward Blackburn, and in lieu thereof I give him £200. I give and bequeath the legacy or sum of six hundred pounds, equally, unto, between, and amongst the therein named Samuel Jameson, John Jameson, Dorothy Smith, Margaret Armstrong, Jane Jameson, and Mary Ann Jameson; the said Jane Jameson and Mary Ann Jameson taking one-fifth share only, upon the same conditions, and under the same limitations in all respects as I have in my said will devised my estate of Folds in their favor.

I release and discharge my said estate from the payment of the legacies therein given to my executors, and I direct all the legacies *therein and* herein given (and not revoked) to be paid out of my personal estate. In all other respects I ratify my said will. In witness whereof, I have hereunto set my hand, this 13th day of April, 1852. Hannah Jameson."

The plaintiffs admitted the due execution of the will and codicil, and the only question raised by them was as to whether the words "therein and," at the end of the codicil, were entitled to probate. By their plea they denied that the codicil, as executed, expressed the wishes and intentions of the deceased; and alleged that she, having a mind to alter her will, sent for William Carrick, her solicitor, and gave him instructions for a codicil, which he reduced into writing, and which instructions were pleaded; which, after giving and revoking the legacies mentioned in the codicil as executed, concluded, "And I charge all the said legacies on my personal estate." That the said William Carrick, intending to prepare the said codicil for execution, and to make a few verbal alterations only, wrote out the paper propounded, but that he inadvertently, or by mistake, and without any instructions whatever to that effect from the deceased, wrote the words, "And I direct all the legacies therein and herein given (and not revoked) to be paid out of my personal estate in lieu of; and I charge all the said legacies on my personal estate." That the effect of the said words, "therein and," which had the effect of discharging the estate of Scales of legacies to the amount of £500, and of the estate of Stainton of the payment of legacies to the amount of £800, was not observed by the said William Carrick, nor by the deceased, when she executed the codicil, and that the said paper writing, containing the words "therein and," was not the codicil of the said deceased.

William Carrick said in examination: he took the instructions from the testatrix by word of mouth, at her residence, and wrote them down in her presence on the draft. The draft was intended to be copied for execution. From the draft he prepared in her presence a copy for execution for her, varying in a few particulars from the draft, but not in substance, until he came to the words in dispute. He read over the draft to her, and asked if it was as she intended it. She expressed herself satisfied with it. He read the copy over to her, so that she could understand it. She said nothing, but proceeded to execute it. He retained the codicil in his custody until the deceased's death. She gave him no instructions to discharge the real estates of Scales and Stainton from the legacies of £1,300; and he had no instructions from her to insert the words "therein and." He inserted them by inadvertence. Her attention was not particularly directed to them, and his attention was first directed to them after her death.

Dr. Deane, Q. C. (*Dr. Tristram* with him), for the defendants.

Dr. Spinks (*Mounsey* with him), for the plaintiffs.

Cur. adv. vult.

Sir J. P. Wilde. The plaintiffs have cited the defendants, to bring in the probate of the will and codicil of Mrs. Hannah Jameson, that it may be cancelled. The defendants have propounded these papers for probate; and the plaintiffs contend that the words "therein and" ought to be expunged from the codicil before probate is granted thereof.

The effect of these words, which undoubtedly appear in the codicil, and were there, it is admitted, when it was executed, is to discharge certain portions of the real estate from pecuniary legacies of considerable amount, with which they were charged by the will.

The ground upon which the court is asked to expunge them, is that they were inserted by the attorney who drew the codicil by mistake, and without instructions. This is proved to be the fact (if the evidence is admissible and can be relied upon) by the oath of the attorney, and by a paper which he swears to have been the rough draft of the codicil made by him in the presence of the testatrix, and from her verbal directions.

It is not, however, denied that the codicil, as it stands, was read to the testatrix, and duly executed by her. Questions of vital importance to the integrity of the present testamentary system are here raised. It devolves on the court to endeavor to disentangle the line of demarcation between what the law allows and what it refuses, to the natural desire of giving effect to what are supposed to be the testator's wishes, and to set clear the limits within which any script duly executed can be shorn of its full testamentary effect, by reference to any other source of information. I must premise that the Wills Act has worked a great change in the old testamentary law, as administered by the ecclesiastical courts on this head. Under that law, a testamentary paper needed not to have been signed, provided it was in the testator's writing; and all papers of a testamentary purport, if in his writing, commanded the equal attention of the court, save so far as one, from its date or form, might be manifestly intended to supersede or revoke another, as a will superseding instructions, or a subsequent will revoking a former.

Hence the class of cases in which those courts have gone farthest in violating the integrity of an executed paper. They will be found collected in the argument of Dr. Addams, in the case of *Fawcett* v. *Jones and others*, 3 Phill. at p. 450, a case remarkable for the evident hesitation and reluctance with which Sir John Nicoll accepted the full results of the principle involved in the previous decisions. His judicial foresight enabled him to turn aside from the brink to which these decisions were urging him; and he refused to pass over a line, which, once passed, would have set all wills at the mercy of parol evidence, and "introduced (as he said) a most alarming insecurity into the testamentary dispositions of all personal property." The most prominent of these cases was *Blackwood* v. *Damer*, 3 Phill. 458. It was appealed to the delegates, who affirmed the decision of the court below, and permitted a will which had been duly signed with full knowledge of its contents, and which contained no residuary clause, to be supplemented

by instructions in the testator's own writing, giving the residue to his daughter, granting probate of the will, and that part of the instructions as together constituting the will, and this on the ground of mistake, proved by the attorney and corroborated by the written paper of instructions. This case was much relied on in argument here. But the words of the Wills Act, "No will shall be valid" unless executed in a certain manner, obviously exclude the probate of unexecuted instructions altogether, and have rendered it no longer possible to the Court of Probate to treat them as part of a will. It is conceded ground in the argument, that this court cannot any longer admit to probate any paper, whatever its form, which is not executed according to the Statute. This class of cases, therefore, is of no authority in reference to wills made since 1838, and, in deciding the present case, may be laid aside. But then comes the question, if the court cannot now, as it could before the Statute, give effect to any provision omitted by mistake from the will, does it still retain the power to strike out any portion of the contents of a duly executed paper on the ground that, although such portion formed part of the paper when executed by the testator, it was inserted or retained by mistake or inadvertence? This is what is asked on the present occasion. Against this being done, it was strongly argued that the court has no such power. The argument was put on several grounds, and, amongst others, upon the ground that parol evidence was inadmissible upon the question. Nothing is less satisfactory than a perusal of the cases decided in the Prerogative Court under this head. In some cases, parol evidence was excluded, and in some admitted, without any sufficient difference in principle to sustain the distinction. I venture to think that the Ecclesiastical Courts created a difficulty (perpetually recurring) for themselves, when they attempted to adopt the well-known rules as to parol evidence, and patent and latent ambiguities, existing in the courts of law and equity, to cases of probate, to which such rules were not properly applicable. For the question in such cases is not what intention ought to be assigned to the words of a given written paper, but to what extent does a given written paper express the testamentary intentions of the deceased. And the function of the court is not to construe a written paper, the validity of which is admitted, but to gather the necessary facts, and pronounce on the validity of the paper. Although it be right to adhere to the writing, and exclude all parol testimony in the former case, it is clearly impossible to do so in the latter. Indeed, the Court of Probate, setting about to ascertain the will of the deceased, could not stir a step in the inquiry without some proof beyond the mere writing. In the attempt to escape these rules, while keeping up the semblance of adhering to them, Sir John Nicoll, in the case above quoted, speaks of "an ambiguity in the *factum*" of the instrument, and makes that the ground of admitting parol evidence. But what, it may be asked, are all controversies as to the instrument, which should be pronounced to contain the testamentary intentions of the deceased, and to be his will, but cases in which some

ambiguity exists as to the *factum* of such instrument as a complete will? The truth is, that the rules excluding parol evidence have no place in any inquiry in which the court has not got before it some ascertained paper beyond question binding and of full effect. Nor, indeed, are these rules pressed in the courts either of law or equity beyond this mark. For if the written document is alleged to have been signed under condition that it should not operate except in certain events, parol evidence has been admitted at law to prove such condition and the breach of it: see *Pym* v. *Campbell*, 6 E. & B. 370. Or if (going farther still) some plain and palpable error has crept into the written document, equity formerly, and the courts of common law now, sanction the admission of evidence to expose the error: see the case of *Wake* v. *Harrop*, 6 H. & N. 768, and the paragraph there cited from Story's Equity Jurisprudence, at p. 772. On this head, then, the court may safely adopt the language of Mr. Justice Williams on Executors, vol. i. p. 313 (5th ed.): "In a court of construction, when the *factum* of the instrument has been previously established in the Court of Probate, the inquiry is almost closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator. But in the Court of Probate the inquiry is not so limited, for there the intentions of the deceased, as to what shall operate as, and compose his will, are to be collected from all the circumstances of the case taken together. They must, however, be circumstances existing at the time the will is made."

I may quit this branch of the subject with the observation that the foregoing remarks have a wider application to wills made before the Statute than since, for the Statute has much narrowed the field of inquiry; the principle, however, is the same. It is hardly necessary to add, that where the Court of Probate has (as is often the case) to construe one admitted testamentary paper, for the purpose of ascertaining another, it acts as a court of construction, and is guided by the same rules. Supposing, then, parol evidence to be admissible in such a case as the present, the question recurs to what extent is it still open to the court since the Statute, to act upon such evidence, for the purpose of rejecting the whole or expunging any portion of the written testament to which the testator has duly affixed his name? A more important inquiry could hardly arise. For you may as effectually incline the balance by taking out of one scale as by adding to the other, and it is quite as easy to vary the effect of a will in any given direction by leaving words out as by putting them in. After much consideration, the following propositions commend themselves to the court as rules which, since the Statute, ought to govern its action in respect of a duly executed paper: First, that before a paper so executed is entitled to probate, the court must be satisfied that the testator knew and approved of the contents at the time he signed it. Secondly, that except in certain cases, where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved the

contents. Thirdly, that although the testator knew and approved the contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend the paper to operate as a will. Fourthly, that although the testator did know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practised on the testator in obtaining his execution thereof. Fifthly, that subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof. Sixthly, that the above rules apply equally to a portion of the will as to the whole. The first and second of these propositions are amply established by the case of *Barry* v. *Butlin*, 2 Moo. P. C. 480, and others of that class in the Privy Council. The third was also well approved law in the Ecclesiastical Courts, for there must be an *animus testandi* to constitute a paper testamentary. The fourth requires no comment, and the last is justified by the case of *Allen* v. *M'Pherson*, 1 H. of L. Cas. 191. It remains to say a few words on the fifth. It is here that the right to derogate from the force of an executed paper approaches and receives its limit. And it is obvious enough, that if the court should allow itself to pass beyond proof that the contents of any such paper were read or otherwise made known to the testator, and suffer an inquiry by the oath of the attorney or others as to what the testator really wished or intended, the authenticity of a will would no longer repose on the ceremony of execution exacted by the Statute, but would be set at large in the wide field of parol conflict, and confided to the mercies of memory. The security intended by the Statute would thus perish at the hands of the court. I have thus endeavored to place the use of parol evidence in these matters on its true ground. The general rule for excluding it in our courts is based upon the proposition that written testimony is of a higher grade — more certain, more reliable — than parol, and that resort should be had to the highest evidence of which a subject is capable, to the exclusion of the inferior class. But it is one thing to admit evidence, and another to give effect to it. If a Statute require that a thing should be in writing and signed, in order to its validity, it precludes the court from giving effect to parol testimony of that which is required to be so written and signed. And if it be said, why, then, admit parol evidence on the subject at all? The answer is, that if the scope of such evidence can be clearly known before it is heard, it should be excluded; but then only on the ground of immateriality, not because it is secondary. In actual practice a large number of cases are so presented that it is impracticable to reject evidence as immaterial before the details of it are known. Little need be added as to the operation of these principles upon the present case. The codicil was proved to have been read over to the testator before the execution thereof, sho

duly executed the same, and the court conceives it to be beyond its functions or powers to substitute the oath of the attorney who prepared it, fortified by his notes of the testator's instructions, for the written provisions contained in a paper so executed. The probate will, therefore, be delivered out to the plaintiffs in its present form.[1]

HARTER *v.* HARTER.

COURT OF PROBATE. 1873.

[*Reported L. R.* 3 *P. & D.* 11.]

SIR J. HANNEN.[2] In this case the plaintiffs, two of the executors of the will of the Rev. George Gardner Harter, deceased, dated the 6th of June, 1862, propound the said will, together with a codicil thereto of the 31st of August, 1863, and in their declaration allege that the word "real," which immediately precedes the word "estate" in the residuary clause of the will was inserted in the said residuary clause by error, contrary to the instructions of the testator, and was retained therein at the time of the execution of the will, without his knowledge or approval, and that by reason thereof the said word "real" is not entitled to be included in the probate. One of the defendants, Elizabeth Jessy Harter, the widow and remaining executrix of the will, has pleaded denying that the word "real" was inserted in the residuary clause by error, contrary to the instructions of the deceased, and that the said word "real" was retained therein without the testator's knowledge and approval, and a further plea that the will with the word "real" in the residuary clause was read over by and to the said testator, who was competent to, and did, understand the same; that the testator at the time of the execution of the said will knew and approved of the contents thereof as the same now appear; and, lastly, that the testator, after executing this said will, duly executed the codicil thereto, dated the 31st of August, 1863, and thereby confirmed, and, in law, re-executed his said will as the same now appears. These portions of the pleadings are sufficient to show the questions which arise for decision in the cause. By the settlement executed on the marriage of the deceased, he had, with his wife, a joint power of appointment of moneys, amounting on the whole to £65,000, for the benefit of one or more of his children. By a subsequent settlement certain freehold and copyhold hereditaments in the county of York stood at the time of the execution of the will in question limited to the use of the deceased and his assigns for life, with remainder to the use of his first and other sons successively, according to seniority, in tail male, with divers remainders over. The deceased was also possessed of real estate of considerable

[1] See *Fulton* v. *Andrew*, L. R. 7 H. L. 448 (1875).

[2] The opinion only is here printed.

value, and of personalty of the value of about £200,000. In this state of things, the deceased, on the 1st of May, 1862, after full explanation from his solicitor, Mr. Slater, of the position of affairs in reference to the said settlements, gave him oral instructions for the preparation of his will. Mr. Slater, in the presence of the deceased, wrote a memorandum of these oral instructions. The deceased also instructed him to prepare a joint appointment under the power in that behalf in the marriage settlement, and this was, as stated by Mr. Slater, part of the scheme the testator wished to be carried out in connection with his will. The memorandum of the instructions for the will is before the court, and is as follows: "Give to wife, Elizabeth Jessy Hall, provisions, wines, liquors, carriages, horses, harness, live and dead stock in and about my dwelling-house and farm at Cranfield, except plate and furniture, with £1,000 legacy to wife absolutely. Set apart a sum sufficient to raise an annuity of £2,000 per annum to Mrs. Harter for life, with powers of investment. Give to Mrs. Harter the privilege of occupying, rent free, the house, outbuildings, garden, and pleasure-grounds at Cranfield Court, until eldest son for the time being shall attain twenty-five years of age, provided she so long remains my widow; and during such occupation of the house Mrs. Harter to have the use of the plate and furniture without liability to loss or breakage. Limit (subject to interest in Cranfield Court given to Mrs. Harter) the Cranfield and other estates in Bedfordshire or Buckinghamshire, including the advowson of Cranfield, and the plate to like limitations as the Yorkshire estate, subject to previous trusts. Give furniture at Cranfield Court to eldest son for the time being on attaining twenty-five. Also give him £20,000 on attaining twenty-one. Give legacy of £10,000 to each of my daughters, Sophia Elizabeth, Jessy H., and Eleanor Maude H., on twenty-one or marriage. And the residue equally among all the sons, including the eldest for the time being, on attaining twenty-one. Maintenance, education, and advancement clauses during minority, as usual. Trustees and executors, my wife and my brother, James Collier Harter." Mr. Slater subsequently handed this memorandum to his managing clerk, Mr. Howarth, who drew up a draft will. In this draft the residuary clause is drawn in the following words: "And subject to the interests hereinbefore contained, upon further trust to stand possessed of all the residue and remainder of my real estate, in trust to divide the same equally between and amongst such of my sons now born or hereafter to be born (inclusive of my eldest son for the time being), as and when they shall severally attain their respective ages of twenty-one years, for their own use and benefit absolutely." A joint appointment providing for the equal division of the funds settled by the marriage settlement was also drawn up. On the 2d of May Mr. Slater handed to the deceased a fair copy of the draft for his perusal; and on the same day the draft of the joint appointment was also furnished to the deceased. On the 6th of May the deceased returned to Mr. Slater the draft will, as to which, after stating that he had carefully

perused it, he suggested certain alterations. These were afterwards embodied in the draft in red ink, and the draft, so altered, was again returned to the deceased. Between this time, the 9th of May, and the execution of the will on the 6th of June, several letters passed between the deceased and Mr. Slater on the subject of the will, which clearly show that the deceased read and fully considered the will, and suggested an alteration in the residuary clause, by which the eldest son was to take a share equal to two of his brothers' shares; but no reference is made in the correspondence to the terms in which the residuary clause was worded, and it remained, with the exception of the above-mentioned alteration, as drawn in the first draft, and was so copied into the will, which was ultimately executed. Mr. Howarth, the managing clerk to Mr. Slater, was called as a witness, and stated that he understood the word "residue" in the instruction, to mean "real and personal," but that by inadvertence he drew it as it now stands, and never noticed the error. Mr. Slater also stated that the terms of the residuary clause entirely escaped his attention. Upon the evidence afforded by the documents in the cause as well as by the oral testimony of the witnesses, I entertain no doubt that the residuary clause, as it stands in the will, does not express the real meaning of the testator. It was not his intention that there should be an intestacy as to his residuary personalty, but that he intended that such residue should be divided amongst his sons, the eldest taking two shares. It is necessary that I should state what appears to me to have been the exact nature of the error by which a failure to express the true intention of the testator has arisen. I think that the error consists in the omission of the words "and personal" after the word "real" in the residuary clause. The memorandum of instructions drawn up by Mr. Slater, deals with realty as well as personalty, and then proceeds to dispose of the residue. This, without qualification, would mean the residue of the testator's property generally, real and personal; and so it was understood by Mr. Howarth, who drew the will. It makes no difference in my judgment, that the testator had not at the time any other realty than that which he had specifically disposed of. That fact may possibly have made him or Mr. Slater careless in the use of a general term wide enough to include realty, if it had existed, but it does not negative an intention on their part to use the word in its ordinary and more extended sense. There was no intention on the part of the testator to leave an intestacy as to any other real estate which he might possess or acquire, but in the belief that he had not and probably would not have any, he was content to use language wide enough to include it. Nor does the fact that the language of the residuary clause in disposing of the residue is rather applicable to personalty, make any difference. On this point the observations of Lord Cottenham in *Saumarez* v. *Saumarez*, 4 M. & Cr. at p. 340, may be referred to. "The circumstances of the testator using expressions and giving directions applicable only to the personal estate, may prove that he did not at the time consider, or was not aware, that realty would be

part of his residue; but if such knowledge be not necessary, as it certainly is not, to give validity to the devise, the absence of it, though so manifested, cannot destroy the operation of the general intent of passing all the residue of his property;" and again, at p. 339, "In considering gifts of residue, whether of real or personal estate, it is not necessary to ascertain whether the testator had any particular property in contemplation at the moment. Indeed, such gifts may be introduced to guard against a testator having overlooked some property or interest in the gifts particularly described." This view of the facts leads me to a conclusion which is decisive of the case. I think it is not in the power of the court to supply words accidentally omitted from a will. The Wills Act (1 Vict. *c.* 26, § 9) admits of no qualification. "No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned," that is, by a duly attested signature. In the present case there is no testamentary disposition of the residue of the personalty of the deceased fulfilling the requirements of the Act, and the intention of the deceased, however clearly it may appear in the unattested instructions, cannot be given effect to. "With respect to wills made on or after January, 1838," says Sir E. V. Williams (1 Wm. Exors. 345, 6th ed.), "it is plain that by reason of the provisions of the Statute 1 Vict. *c.* 26, the whole of every testamentary disposition must be in writing and attested pursuant to the Act. Whence it follows that the court has no power to correct omissions or mistakes by reference to the instructions in any case to which that Statute extends." This disposes of the numerous cases, which were cited in argument, of dates anterior to 1 Vict. *c.* 26: and with regard to wills to which that Statute is applicable, it has not been suggested that the court can admit to probate any words not contained in some duly attested testamentary document, however cogent the evidence may be, from oral or written instructions, that they were intended to be part of the will. But it was contended on behalf of the plaintiffs that the true view of the nature of the mistake in the draft and copy as executed is not that the words "and personal" were omitted, but that the word "real" was inserted, and that the will ought to be made to read "all the residue and remainder of my estate." I have already stated my grounds for holding that the error was one of omission, but there are further special reasons why I cannot expunge the word "real" from the residuary clause. There are undoubtedly numerous cases which establish that this court may decree probate of a part only of a properly attested instrument purporting to be a will. It is not necessary to do more than refer to the authorities collected in the case of *Fawcett* v. *Jones*, 3 Phillim. 434, which, though relating to wills before the Statute 1 Vict. *c.* 26, are on this head applicable to wills of a later date. And in the case of *Allen* v. *M'Pherson*, 1 H. L. C. at p. 209, Lord Lyndhurst said, "It is perfectly clear that the Ecclesiastical Court may admit part of an instrument to probate, and refuse it as to the rest." Lord Campbell (1 H. L. C. at p. 233) in the same case says, "It is quite clear that the Ecclesi-

astical Court had jurisdiction to refuse probate of that part of the codicil which affects the appellant, because, giving credit to the facts stated, that part of the codicil was not the will of the testator; he was imposed upon, and probate of that part of the codicil ought to have been refused." In that case fraud was the ground on which it was sought to expunge a part of a codicil; but *In the Goods of Duane*, 2 Sw. & Tr. 590, Sir C. Cresswell applied the same reasoning to a case of simple mistake. There the words which were rejected were part of a printed form, and ought to have been struck out as inconsistent with the instructions given by the testator; they were not read by or to the testator, but the person who prepared the will omitted to strike them out. Sir C. Cresswell, after referring to *Allen* v. *M'Pherson*, said: "I can see no difference in principle between that case and the present one, where a clause for which the deceased gave no instructions, and which was not read over to him, formed *per incuriam* part of the document signed by the deceased." The facts of that case distinguish it in an essential manner from the present. There an entire clause of which the testator was altogether ignorant was introduced by accident, and it was contrary to the intention of the person who drew the will that the clause should be in it. In the present case the testator intended that a clause disposing of the residue of his personalty should be in the will, but he left it to another person to choose the language by which his intention should be carried into effect, and he read and adopted as his own the language so chosen. Inappropriate language having been used, the court is asked to remedy the mistake, not by rejecting words of which the testator is proved to have been ignorant, but by modifying the language used by the draftsman, and adopted by the testator, so as to make it express the supposed intention of the testator. This is, in fact, to make a new will. The theory of the plaintiffs, is that the testator had his personalty only in his mind, when he gave instructions for the residuary clause, because he had no realty undisposed of. If so, the proper mode of carrying out the instructions would have been to say, "the residue of my personal estate;" and in that case the error consists in having substituted the word "real" for "personal." Upon this hypothesis the court is asked to strike out the word "real," not because the clause would then be in the form the testator intended, but because it would in its transformed shape substantially carry out the testator's wish. It is also to be observed, that not only the form, but probably the effect would be different; for a bequest of the residue of the testator's estate would, according to the modern decisions, include the realty, unless the context clearly excluded it: Jarm. on Wills, ch. 22; *The Mayor and Corporation of Hamilton* v. *Hodsdon*, 6 Moore P. C. 76. Such a mode of dealing with wills would lead to the most dangerous consequences; for it would convert the Court of Probate into a court of construction of a very peculiar kind, whose duty it would be to shape the will into conformity with the supposed intentions of the testator. In very many of the cases which come

before the courts of law and equity, as to the proper construction of wills, the intention of the deceased is supposed to be seen, but the question is whether the language used expresses the intention. If the process now sought to be applied to this will were to be adopted, the Court of Probate will in future be asked, first to ascertain by extrinsic evidence what the testator's intention was, and then to expunge such words or phrases, as, being removed, will leave a residuum, carrying out the intention of the testator in the particular case, though different in form, and possibly in legal effect, from that which the testator or his advisers intended. If I felt myself at liberty to adopt such a course, I should think that the best amendment of the will would be to leave the word "residue" by itself in the residuary clause as it is in the memorandum of instructions. But it is obvious that, though this might give effect to the testator's wishes in this instance, it would be by an accident; for the word "residue," taken with the context of the will, might have had a different effect to that which it has in connection with the context of the instructions; but, for the reasons I have given, I entirely repudiate this mode of altering the language of a testamentary instrument, and I am, therefore, of opinion that whether the error which has undoubtedly crept into the will be one of omission or insertion, it is equally beyond the jurisdiction of this court to correct it. I have thus far considered the case, apart from the decision of Lord Penzance in *Guardhouse* v. *Blackburn*, Law Rep. 1 P. & M. 109, but I must add that it appears to me that that is an authority directly decisive of this case in favor of the defendants. It was there established to the satisfaction of the court that specific words had been inserted by the attorney who drew the codicil by mistake, and without instructions. Yet the learned judge held that as the contents of the codicil had been brought to the knowledge of a competent testatrix, the execution of the instrument must be deemed conclusive evidence that she approved as well as knew the contents. If I did not agree in the reasons given by Lord Penzance for his decision, it would be my duty to follow it in a similar case; but I must add, that I entirely adopt my predecessor's very lucid exposition of the rules by which this court ought to be governed with reference to the rejection of the whole or part of a duly executed testamentary document. The conclusion I have arrived at makes it unnecessary that I should express a positive opinion on the effect which the execution of the codicil would have had on the will, if I had thought that the word "real" ought to be expunged from the residuary clause, but I am strongly inclined to think that it would have made no difference, and that the codicil must be held to confirm only that which was the true will of the testator. For these reasons I pronounce for the will in its present form.

Dr. Spinks, Q. C., and *Dr. Tristram*, appeared for the plaintiffs.

Inderwick and *Mellor* appeared for the respective defendants.[1]

[1] "When an instrument purporting to be the will of the deceased person has been executed by the deceased in the proper manner, but it is sufficiently proved that though

GOODS OF OSWALD.

COURT OF PROBATE. 1874.

[*Reported L. R.* 3 *P. & D.* 162.]

MARTHA OSWALD, of Beccles, Suffolk, widow, deceased, died on the 21st of March, 1873, having made a will with two codicils thereto, dated respectively the 3d of March, 1859, and the 3d of March, 1865, and one codicil without date. By the will she appointed James Read the younger and Henry James Kerrison executors and trustees. She gave to her daughters, Georgina Emily Crisp and Sarah Read, to and for their uses absolutely, all her household goods, and furniture, plate, china, wearing apparel, and consumable stores, and the residue to her two sons, Robert William Oswald and William Oswald, and the two daughters above-mentioned, equally, for their uses absolutely. On the 7th of December, 1872, she executed another testamentary paper to the following effect: "This is the last will and testament of me, Martha Oswald, of Beccles, in the county of Suffolk, widow, whereof I appoint James Read the younger, of Mildenhall, Suffolk, gentleman, and Henry James Kerrison, of Beccles, aforesaid, gentleman, executors. I give and bequeath all my furniture, plate, linen, china, books, and all other household effects now belonging to me, unto Georgina Emily Crisp, the wife of James Crisp, of Beccles, aforesaid, coal merchant, for her own separate use and benefit, free from all control, debts, or interference of her said husband, the said James Crisp. I hereby revoke all former

he executed the instrument, yet that from fraud he executed that which was not his will, there is no difficulty in pronouncing that the instrument is not his will. And it has been held that when it is sufficiently proved that the instrument comprised his will, but that from fraud, or perhaps from inadvertence, such as that *In the Goods of Duane*, the instrument which he actually executed contained also something which was not his will, this latter part is to be rejected. And in such a case, if this latter part is so distinct and severable from the true part that the rejection of it does not alter the construction of the true part, it has been held that, consistently with the Statute of Wills, the execution of what was shown to be the true will, and something more, may be treated as the execution of the true will alone. A much more difficult question arises where the rejection of words alters the sense of those which remain. For even though the court is convinced that the words were improperly introduced, so that if the instrument was *inter vivos* they would reform the instrument and order one in different words to be executed, it cannot make the dead man execute a new instrument; and there seems much difficulty in treating the will after its sense is thus altered as valid within the 9th section of the 7 Will. 4 & 1 Vict. *c.* 26, the signature at the end of the will required by that enactment having been attached to what bore quite a different meaning. It has never, as far as their Lordships are aware, been necessary to decide as to this, though the judgment of Sir James Hannen in *Harter* v. *Harter* has some bearing on it. And their Lordships think it unnecessary and therefore improper now to express any opinion on this question, for the evidence does not raise it." — *Per* LORD BLACKBURN in *Rhodes* v. *Rhodes*, 7 Ap. Cas. 192, 198 (1882).

wills by me heretofore made. It witness," &c. It appeared from the affidavit of Mr. Kerrison that in December, 1872, he saw and had a conversation with the deceased upon the subject of her will and the manner in which her household furniture was to be disposed of. James Crisp, the son-in-law of the deceased, to whose wife a portion of such furniture was bequeathed by her will, was in pecuniary difficulties, and he therefore suggested to Mrs. Oswald that she should secure the furniture for the sole and separate use of her daughter, free from the control, debts, or interference of her husband. The deceased assented, and instructed him (Mr. Kerrison) to have a document, carrying out the suggestion, prepared. Mr. Fiske was requested to draw up the proper instrument for the purpose, and prepared the will dated the 7th of December, 1872, which was sent to Mr. Kerrison, who, accompanied by his wife and Georgina Cowles, the two attesting witnesses, attended upon the deceased, when it was duly executed by Mrs. Oswald. The paper was never read over by or to the deceased before she executed it, and she was not aware of the clause of revocation contained therein. No instructions were given to Mr. Fiske to insert such a clause, and it never was the intention of the testatrix to revoke the dispositions made by her of her property, except so far as to secure the bequests made to her daughter. The whole property of the deceased was in value under £200. All the next of kin and the parties entitled in distribution in case the deceased had died intestate consented to probate being granted as asked for by this motion.

G. H. Cooper applied to the court to decree probate of the will dated the 3d of March, 1859, and of the two codicils thereto, as also of the paper dated the 7th of December, 1872, as together containing the will of the deceased, excluding from the last the clause of revocation. He referred to *In the Goods of Duane*, 2 Sw. & Tr. 590; 31 L. J. (P. M. & A.) 173.

Sir J. Hannen. It was clearly not the intention of the deceased to revoke her previous will. From the facts stated in the affidavit it is evident that the words of revocation were introduced into the last paper *per incuriam*, and therefore probate will issue without them.[1]

[1] *Morrell* v. *Morrell*, 7 P. D. 68 (1882), *accord.*

Note. — A paper in form a will, but not really intended as such, as where it was made to show in how short a form a will could be drawn, *Nichols* v. *Nichols*, 2 Phillim. 180 (1814), or to induce a third person to believe a will had been made, *Lister* v. *Smith*, 3 Sw. & Tr. 282 (1863), but not intended to be operative, will not be admitted to probate. So when one paper is signed by mistake for another, it is not a will, *Goods of Hunt*, L. R. 3 P. & D. 250 (1875).

D. *Form.*

LEMAYNE *v.* STANLEY.

Common Pleas. 1681.

[*Reported* 3 *Lev.* 1.]

In ejectment upon *Not guilty*, and a special verdict, the case was: Stanley seised in fee writ his will with his own hand; beginning, "In the name of God, amen, I John Stanley make this my last will and testament," and thereby devised the lands in question, and put to his seal, but did not subscribe his name, only had it subscribed by three witnesses in his presence; and all this was done after 29 Car. 2, against Frauds and Perjuries; and whether this was a good will to pass the lands, was the question. And after several arguments it was adjudged by the whole court, *sc.* North, Wyndham, Charlton, and Levinz, to be a good will; for being written by himself, and his name in the will, it is a sufficient signing within the Statute, which does not appoint where the will shall be signed, in the *top*, *bottom*, or *margin*, and therefore a *signing* in any part is sufficient. And *per* North, Wyndham, and Charlton, the putting of his seal had of itself been a sufficient *signing* within the Statute; for *signum* is no more than a *mark*, and sealing is a sufficient *mark* that this is his will: but Levinz doubted of this upon the case in Roll. 1 Abridgm. 245, § 25. Submission to an award *ita quod* it be made, *signed*, and delivered, the arbitrator makes an award, and delivers it, but does not *sign* it: *Et per Cur'*. It is not good; but all agreeing upon the other reason, judgment was accordingly given for the defendant.[1]

[1] "It was said by Lord Chief Baron Parker, Baron Clive, and Baron Smythe (*absente* Legg), that what is said by North, Windham, and Charlton, in 3 Lev. 1, 'That putting a seal to a will is a sufficient signing within the Statute of Frauds and Perjuries,' is very strange doctrine; for that if it was so it would be very easy for one person to forge any man's will, by only forging the names of any two obscure persons dead, for he would have no occasion to forge the testator's hand. And the barons said if the same thing should come in question again, they should not hold that sealing a will only, was a sufficient signing within the Statute." — *Smith* v. *Evans* (Exch. 1751), 1 Wils. 313.

On signing at the "foot or end," see St. 7 Wm. IV. & 1 Vict. *c.* 26 (1837), § 9 (Wills Act), and St. 15 & 16 Vict. *c.* 24 (1852), and 1 Woerner, Amer. Law of Adm. § 39.

JENKINS *v.* GAISFORD.

COURT OF PROBATE. 1863.

[*Reported* 3 *Sw. & Tr.* 93.]

JOHN JENKINS, late of Botley Hall, in the county of Southampton, Esq., died on the 22d of November, 1862, leaving a will, duly executed on the 14th of April, 1862, whereby he appointed his sister, Jane Gaisford, and his brother, Henry Jenkins, executrix and executor. There were two codicils, dated respectively the 5th of November, 1862, and the 6th of November, 1862, and an affidavit made by Henry Atkins stated the manner in which they had been executed.

Henry Atkins deposed as follows: "That I have for one year and upwards during the lifetime of the said John Jenkins, and up to the time of his death on the 22d of November last, acted as amanuensis to the said John Jenkins, who had for a considerable time past much difficulty in writing or signing his name; that the said John Jenkins, some months previously to his death, had an engraving made of his usual signature in order that the same might be used to stamp or impress his signature to letters and other documents, and that in his presence I have been in the habit of affixing to letters and other documents and papers the name of the said John Jenkins by means of the said stamp or engraving; that I am one of the subscribing witnesses to the first codicil to the will of the said John Jenkins, now produced and shown to me, the said codicil being written at the foot of the said will, and bearing date the 5th of November, 1862; that the said codicil was executed by the said testator on the day of the date thereof by my affixing or impressing the signature of the said John Jenkins, in compliance with his express orders and direction, at the foot or end thereof by means of the said stamp or engraving as the same now appears thereon, in the presence of the said John Jenkins and of Ann Budd, the other subscribing witness thereto, both of us being present at the same time, and that the said testator, after his signature had been affixed to the said codicil as aforesaid, placed his hand on the said codicil and acknowledged the signature as his own, and the said codicil to be a codicil to his last will, and requested me to attest the same, and I and the said Ann Budd thereupon attested and subscribed the said codicil in the presence of the said testator and of each other." The deponent then gave a similar description of the manner in which the testator's signature had been stamped upon the second codicil.

Dr. Spinks moved for probate of the will and two codicils.

SIR C. CRESSWELL refused to grant probate of the codicils on motion.

Henry Jenkins, the executor named in the will, thereupon propounded the will in a special declaration containing a statement of the above facts, and cited Mrs. Gaisford and Mrs. Thring, the sisters, and with

himself the only next of kin, of the deceased. An appearance was given on behalf of Mrs. Gaisford, and a demurrer to the declaration filed and joinder in demurrer; but before the demurrer came on for argument Mrs. Gaisford died, and Mrs. Thring declined to take any steps in the matter.

Spinks, ex parte. *Cur. adv. vult.*

Sir C. Cresswell. I am of opinion that the codicils were duly executed so as to comply with the 1 Vict. c. 26, § 9. It has been decided that a testator sufficiently signs by making his mark, and I think it was rightly contended that the word "signed" in that section must have the same meaning whether the signature is made by the testator himself, or by some other person in his presence or by his direction, and therefore a mark made by some other person under such circumstances must suffice. Now, whether the mark is made by a pen or by some other instrument cannot make any difference, neither can it in reason make a difference that a fac-simile of the whole name was impressed on the will instead of a mere mark or X. The mark made by the instrument or stamp used was intended to stand for and represent the signature of the testator. In the case where it was held that sealing was not signing, the seals were not affixed by way of a signature.[1]

HUNT *v.* HUNT.

Superior Court of Judicature of New Hampshire. 1828.

[*Reported* 4 *N. H.* 434.]

This was an appeal from a decree of the judge of probate, in this county, allowing a certain instrument as the last will and testament of Arad Hunt, deceased. The said instrument was as follows: —

"$1,000. Brattleboro', April 28, 1813.

"For value received, I promised to pay Arad Hunt, or his order, one thousand dollars, within one year from this date, and interest.

"Luther Weld.

"Attest: Jonathan Hunt."

There were upon the note the following indorsements: —

"March 21, 1814, received one year's interest. September 14, 1814, received forty dollars. November 1, 1814, received two hundred and four dollars. May 22, 1818, received thirteen dollars and six cents."

"If I am not living at the time this note is paid, I order the contents to be paid to Arad Hunt, 2d.

Witness: Arad Hunt."

[1] But see *Goods of Emerson*, 9 L. R. Ir. 443 (1882).

The testator died in February, 1825.

The appellant filed in the court below, the following, as the reasons for claiming the appeal.

1st, That the said instrument, as presented, has not any of the formalities of a last will, as prescribed by the Statute of July 2, 1822. There is no seal affixed to the signature of the said Arad Hunt, the supposed testator.

2d, That said instrument does not appear to have been executed in the presence of any witnesses.

3d, That it does not, on the face of it, purport to be a testamentary disposition of the note, but a mere gift, which could only be perfected by a delivery of the instrument.

4th, That the instrument was found among the papers of the deceased, and that no person was thereby appointed or requested to execute it, which must show that the deceased did not intend to declare that as his last will.

5th, That the said Arad never intended the same as a will.

6th, That the same, if ever intended as a will, was revoked by the said Arad before his decease.

7th, That the said note was made in the State of Vermont, and the maker has always resided in that State, having no property in this State.

8th, That administration of all the estate of said Arad, deceased, within the jurisdiction of said judge of probate, for the county of Cheshire has, long since, been granted by said judge, and is still in force.

H. Hubbard, for the appellant.

Handerson, for the appellee.

By the Court. It is not disputed, in this case, that the deceased signed the writing which is offered for probate. There is no evidence, that he ever abandoned the original intention with which he made the writing. But it is objected, that the writing is not in its nature testamentary. We think, however, that the authorities adduced by the appellee's counsel are decisive, to show that the writing is testamentary, and as such, entitled to probate. Lovelass on Wills, 160; Wentworth's Office of Ex'rs, 261; Godolphin, 67; 3 Vesey & Beame, 54, *Akerman* v. *Burrows*. *Decree of the court below affirmed.*

[1] See *Castle* v. *Torre*, 2 Moore, P. C. 133 (1837); *Fosselman* v. *Elder*, 98 Pa. 159 (1881); *Byers* v. *Hoppe*, 61 Md. 206 (1883).

In those of the United States which have adopted provisions concerning nuncupative wills similar to those in § 19 of the Statute of Frauds, "In the time of the last sickness" has generally been construed "*in extremis*." See *Prince* v. *Hazelton*, 20 Johns. 502 (1822); *Yarnall's Will*, 4 Rawle, 46, 65 (1833); *Boyer* v. *Frick*, 4 W. & S. 357 (1842); *Werkheiser* v. *Werkheiser*, 6 W. & S. 184 (1843); *O'Neill* v. *O'Neill*, 33 Md. 569 (1870); *Carroll* v. *Bonham*, 42 N. J. Eq. 625 (1887).

Contra, see *Johnston* v. *Glasscock*, 2 Ala. 218 (1841); *Nolan* v. *Gardner*, 7 Heisk. 215 (1872); *Harrington* v. *Steer*, 82 Ill. 50 (1876).

Cf. 1 Woerner, Amer. Law of Adm. §§ 44, 45.

E. *Incorporation by Reference.*

MOLINEUX *v.* MOLINEUX.

King's Bench. 1607.

[*Reported Cro. Jac.* 144.]

Ejectment of a lease of Bridget Molineux at Thorp, of a house and lands in Thorp, and also *de libera piscaria infra rivulum de Trent*, *habendum* for three years, &c. Upon Not guilty pleaded, it was found by special verdict, that Sir Edward Molineux was seised of the said tenements and piscary in fee, and held them in socage, and made his will in writing, whereby he devised in this manner: "I, Edward Molineux, make my will as concerning the disposition and order of certain annuities or rents to be issuing out of certain of my lands and tenements, as followeth: Whereas I have lands in Thorp, &c., in the county of Nottingham, I will that my younger children not married, viz. Edward, Thomas, Christopher, &c., shall have such several annuities or annual rents as be expressed in several writings signed with my hand, and sealed with my seal, according to the true meaning of my said writings. And whereas my said lands are of greater value than the said annuities, I will, that if my heir after my decease truly pay the said annuities, that then my said heir shall have the order and disposition of my lands as long as he shall perform my will. And if my heir do not perform my will therein, then I will that my executors, and the survivors of them, shall have the order and disposition of my said lands to perform my will; and my son and heir to have no meddling therewith, because he hath not performed my will. And if there be default in my said heir that my will is not performed, and also in my executors, or the survivors of them, that my will is not performed, then I will that all my said lands shall be to my younger children during their lives." And he constituted John his eldest son, and the said Edward and Thomas, and two others, his executors, and died. — The jury find, that he made a writing of the grant of the rent of £6 13*s.* 4*d.* by the year issuing out of all his lands to Christopher Molineux for his life, with clause of distress, which was signed and sealed by him; and that afterward John the eldest son paid it during his life, and had issue Edward, and died; that Edward assured that land to Bridget the lessor for her life; and that afterwards the rent of £6 13*s.* 4*d.* mentioned to be granted to the said Christopher, was not paid at the Annunciation, *anno* 40 Eliz. by Edward, nor at any time after by the said Edward, nor by the executors of Sir Edward Molineux, nor by any of them; and that Edward the son of John died; and Bridget entered and let to the plaintiff; that Christopher entered for non-payment of the rent, &c.

The Court, after divers arguments at the bar, resolved for the plaintiff.

First, they held, that this will devising such rents, which are mentioned in such writings under his hand and seal, is a good devise in writing of the rents themselves: for it refers to the writing, whatsoever it is, as if it were specially limited in that will; and it is a good devise to them of the several rent-charges; Tanfield therefore resembled it to the case where a man devises that his executors shall sell his lands, and the executors afterwards sell them, it is a good devise of the land itself by that will. And upon this reason, in *Fairfax's Case*, in the Court of Wards, it was resolved by the opinion of the chief justices and the counsel of that court, that where one makes a deed of feoffment to divers uses, and makes no livery, and after by his will devises the land to such persons and in such manner as he appointed by his deed of feoffment, it was a good devise of the land. But they all held, that a will cannot refer to words only without writing, but it ought to be a will in writing for all; and therefore there cannot be any averment to add anything thereto by words *dehors*, nor to abridge it by a condition added thereto by words.[1]

HANNIS *v.* PACKER.

Chancery. 1752.

[*Reported Ambl.* 556.]

Mary Meredith, being entitled to a real and personal estate, duly made her will 29th January, 1727, and devised to her sisters all the rest and residue of her real and personal estate, *after payment of her debts and legacies*, and made them executrixes.

The testator some time afterwards made a codicil, and gave plaintiff a legacy in the words following: "This I desire may be performed by my loving sisters, to give £200 to my cousin Edward Hannis." But this codicil was not executed in the presence of any witnesses.

The question made was, Whether the £200 legacy, given by the codicil, was a charge upon the real estate. These cases were cited on the part of the plaintiff: *Masters* v. *Masters*, 1 Wms. 421; *Brudenell* v. *Boughton*, 6th March, 1741; *Lord Inchiquin* v. *Obrien*.

Lord Hardwicke, Chancellor. When a real estate is duly devised to trustees, and is well charged, by a will duly executed, with debts and legacies, debts which are contracted after making the will, or legacies given by a codicil, though not duly executed, will be a charge upon the real estate; for the real estate was well charged by the will with the debts and legacies; and it is immaterial by what instrument they appear, provided such instrument has been proved as part of the will; and when that is done, it is sufficient to denote the trust, and that it is part of what was intended to be comprised.

[1] The rest of the opinion, deciding other points, is omitted.

ROSE *v.* CUNYNGHAME.

CHANCERY. 1805.

[*Reported* 12 *Ves.* 29.][1]

ROBERT UDNY by his will, dated June 1, 1801, and duly executed according to the Statute of Frauds, devised to trustees all his real and personal estate in the island of Grenada upon trust by and out of the produce of said real and personal estate to pay off and discharge all debts and encumbrances, to which the said estates should be liable at his decease; and also to pay off and discharge all such annuities, legacies, or bequests, as he should give or bequeath to be paid out of and from, or charge and make chargeable upon, his real or personal estate in the said island of Grenada by his will or by any codicil or codicils thereto or by any writing or writings at any time or times hereafter, signed by him, or in his own handwriting, whether witnessed or not; and after payment and satisfaction of the said debts and other encumbrances, annuities, legacies, and bequests, as aforesaid, upon certain other trusts.

By a subsequent clause the testator declared that he charged his estates in Grenada with the payment of an annuity of £200 to his wife.

The testator made several codicils to his will, all of which were written by himself and signed but not attested. One of the codicils was as follows: "By this further codicil to my will and other codicils dated this 27th day of August, 1701 [*sic*], I leave my dear wife, that she may suffer no inconveniency from the change of her situation, an additional £100 *per annum* from my Grenada estate on the same terms of the former £200 to be paid to her by my executors, being in all £300."

Under the bill of the trustees a decree was made, among other things, directing an inquiry, what encumbrances affect the estate in Grenada. An exception was taken to the Master's report for not stating the annuity of £100, given to the wife by the codicil.

Mr. Richards and *Mr. Thomson*, in support of the exception.

Mr. Romilly and *Mr. Cullen*, for the report.

June 27. THE MASTER OF THE ROLLS. [SIR WILLIAM GRANT.] I shall give no final opinion at present. But this case is materially different from any that have been hitherto decided; for the charge is of a very peculiar nature; not of all legacies he shall afterwards give; but of all such legacies as he shall afterwards charge upon the estate, or make payable out of it. Suppose he had given a general legacy by his will; that would not be charged upon this estate: nor a general legacy by a codicil. For that purpose the legatee must show that his legacy was made chargeable upon, or payable out of, the Grenada estate. That seems in effect a reservation by a will, duly executed, of a power to charge the Grenada estate by a will, not duly attested. When a

[1] The statement of this case is abbreviated from the report.

man by a will, duly executed, charges all legacies generally, expressing his resolution that whenever he gives them, they shall be a charge, it is determined, that whenever given, they shall be a charge. But according to this it is not in the duly attested will alone that you find the charge: but the intention to make it a charge may be in the unattested instrument, the codicil. This is a new case; nearer to *Habergham* v. *Vincent*, 2 Ves. Jr. 204, than any other; where by a will, duly attested, the testator seemed to reserve to himself a power to dispose by a deed.

August 7. I stated my impression as to this case before; and regret, that further consideration has not induced me to alter that impression; as the consequence is, that the widow is deprived of a part of that provision which was obviously intended for her. The ground upon which it is contended, that this additional annuity of £100 might be good as a charge upon the Grenada estate, is, that the estate being once charged with all legacies and annuities, the testator may afterwards give either legacies or annuities by an unattested codicil; that the rule is so settled in many cases; and, if this were that case, unquestionably it is too well established to be now disturbed; though it may be doubted whether it is perfectly consistent with the Statute of Frauds (Stat. 29 Ch. II. *c.* 3); for in effect the testator does dispose of his land by an unattested codicil, when he is at liberty to burden it with legacies so given. However in this case the testator does not charge the Grenada estate with legacies or annuities generally; but with such only as he shall afterwards give, and charge upon that estate: so that, as legacy or annuity, it is not at all chargeable upon the estate: but it is, as he has thought fit by an unattested codicil to declare, that it shall be a charge upon the estate. The reason, that debts and legacies may be a burden upon the estate, is, that they constitute a fluctuating charge. It is impossible previously to ascertain what debts a man may owe at the time of his death: and it is difficult to ascertain, when he is making his formal and regular will, what legacies he may think fit, or his fortune will enable him, to give. The court has therefore said, that when he has by a will, duly executed, charged debts and legacies, it is only necessary to show that there is a debt, or that there is a legacy, in order to constitute a charge; for the moment that character is shown to belong to the demand, you show that it is already charged upon the estate. Then, an unattested instrument is itself perfectly competent to give a legacy; and, when given, you predicate of it that it is a legacy: and then the charge immediately attaches by virtue of the executed will. But here the testator says, he does not now determine that all annuities and all legacies he shall hereafter give shall be charges; but only, that if at some future period he shall think proper to declare legacies and annuities to be charges upon this real estate, then the trustees shall pay them out of the real estate. Therefore, not only the legacy is to be found; but also the will of the testator to make it a

charge upon this estate; without which it is not a charge. This is only an attempt to reserve by a will, duly executed, a power to charge by a will not duly executed. It is the case of *Habergham* v. *Vincent*. It might as well have been contended in that instance, that there was an adoption into the will of that future instrument: but the opinion of the Lord Chancellor and the judges was, that it was not competent to a man to give himself such a power; viz. a power to dispose of land by an unattested instrument. That is the reservation this testator attempts to make; for, unless he thinks fit, when he makes his codicil, to declare his intention that his land shall be charged with the legacy or annuity, it shall not be charged. Then it is through the medium of an unattested instrument that it is to be a charge upon land; and that cannot be within that case. The Master is therefore right in reporting, that this annuity of £100 is not a charge upon the Grenada estate; and the exception must be overruled.[1]

STUBBS *v.* SARGON.

CHANCERY. 1838.

[*Reported* 3 *Myl. & C.* 507.]

THE LORD CHANCELLOR. [LORD COTTENHAM.][2] The second question is, Whether the ultimate devise of the premises in Little Queen Street be void, either under the Statute of Frauds, or for uncertainty. The earnestness with which the point was pressed at the bar by very eminent and learned counsel, has induced me to devote more consideration to the subject than I should have thought necessary from any difficulty I have felt upon the point itself. The devise is to trustees to keep in repair the premises, and, subject thereto, to pay the rents to the testatrix's sister, Mary Innell, during her life, and after her decease, in trust to dispose of and divide the same unto and amongst her partners who should be in copartnership with her at the time of her decease, or to whom she might have disposed of her business, in such shares and proportions as her trustees should think fit and deem advisable.

She gave her stock in trade to her executors to sell, but with liberty for her partners, or the persons who should be entitled to her freehold premises under her will, to purchase the same at a valuation.

She gave the residue of her personal estate amongst certain of her nephews and nieces; but provided that such of her nephews as should be entitled to any beneficial interest in her freehold premises under her will, should have only one half of the shares of the others.

[1] See *Johnson* v. *Ball*, 5 De G. & Sm. 85 (1851); *Thayer* v. *Wellington*, 9 Allen, 283 (1864).

[2] Only the opinion is given, and of that the portions relating to other points are omitted.

Upon the first head of objection, namely, the Statute of Frauds, it was argued that the will contained no disposition of itself, but that it was a reservation to the testatrix of the power of completing the devise by investing the intended devisee with the character described in the will, and that *Habergham* v. *Vincent*, 2 Ves. Jr. 204; 4 Bro. C. C. 353, was in point in support of that proposition. The difference between the two cases is, that the will in *Habergham* v. *Vincent* contained no devise of the remainder; it only declared that the remainder should be for such persons and for such estates as the testator should, by any deed or instrument attested by two witnesses, appoint. This was no disposition of the property; but a reservation by will, inoperative till the testator's death, of a power to dispose, in his lifetime, of freehold property, by an instrument not attested according to the Statute of Frauds.

In the present case, the disposition is complete. The devisee, indeed, is to be ascertained by a description contained in the will; but such is the case with many unquestionable devises. A devise to a second or third son, perhaps unborn at the time — many contingent devises — all shifting clauses — are instances of devises to devisees who are to be ascertained by future events and contingencies; but such persons may be ascertained, not only by future natural events and contingencies, but by acts of third persons. Suppose a father, having two sons, and having a relation who has a power of appointing an estate to some one of them, makes his will, and gives his own estate to such one of his sons as shall not be the appointee of the other estate — or with a shifting clause. Here the act of the donee of the power is to decide who shall take the father's estate; but there is nothing in the Statute of Frauds to prevent this, because the devise by the will is complete, that is, the disposition is complete — the intention is fully declared, though the object to take remains uncertain. If the subsequent act removing that uncertainty, and fixing the identity of the devisee, were to be considered as testamentary, in the case above supposed, the donee of the power would be making or completing the will of the father, that is, one man would be making another man's will. The act, therefore, is not testamentary; and, if not, then why should not the act be the act of the testator himself? It is objected to upon the ground of its being testamentary; but if it be not testamentary when done by a stranger, it cannot be so when done by the testator. If it were otherwise, a testator could not devise lands, or give legacies charged upon land, to such person as might be his wife at his death — to such children as he might have — or to such servant as he might have in his service at his death. The cases of charging legacies generally by a will, and naming legatees by an unattested instrument, carry this principle to the greatest length, because the subsequent act ascertaining the party to take is also testamentary; but that rule is recognized by Lord Rosslyn in *Habergham* v. *Vincent;* and Sir W. Grant, in *Rose* v. *Cunynghame*, 12 Ves. 29, — see page 38, — explains it upon the principle I have adverted to. He

says the will creates the charge; it is only necessary to show that there is a legacy; for the moment that character is shown to belong to the demand, you show that it is already charged upon the land: and his decision in that case marked the distinction, for the testator did not charge his legacies by his will, and name the legatee by a codicil; but he devised his estate to pay such legacies as he should bequeath to be paid out of his estate; and afterwards, by an unattested codicil, attempted to charge a legacy upon the estate; which Sir W. Grant held he could not do, because, not only is the legatee to be found in the codicil, but the will to make the charge — that not being to be found in the will. I think, therefore, the objection upon the ground of the Statute of Frauds cannot be supported.

Then as to the uncertainty, I think the facts stated in the Master's report, clearly bring the parties within the description in the will. The testatrix, being desirous of herself retiring from business, and having nephews and nieces, some of whom had been her partners, gives up the business to four, some of whom had been her partners, and others whom she then introduced, and gives to the four stock in trade to the amount of £1,000; and, by circulars, introduces to her former connection these four persons, whom she calls her successors. These certainly are persons to whom she had disposed of her business within the meaning of the will.

Sir C. Wetherell and *Mr. Wakefield*, for the heiress-at-law.

Mr. Spence and *Mr. Walker*, *Mr. Tinney* and *Mr. Richards*, *Mr. Knight Bruce*, *Mr. Parker*, *Mr. Teed*, *Mr. Rogers*, *Mr. Bethell*, and *Mr. Hill*, for other parties.[1]

ALLEN *v.* MADDOCK.

PRIVY COUNCIL. 1858.

[*Reported* 11 *Moo. P. C.* 427.]

THEIR Lordships' judgment was delivered by the RIGHT HON. T. PEMBERTON LEIGH.[2]

On the 1st of December, 1851, Anne, the wife of Joseph Emanuel Allen, but who was separated from her husband, and who had assumed, and was known by, the name of "Foote," drew up in her own handwriting, and signed and sealed, a paper of that date, described in its commencement as the "last will and testament of me, Anne Foote, of Bath, which I make and publish for all my worldly substance." By this instrument she gave several legacies, and appointed executors, but made no disposition of the remainder of her property.

[1] See *Langdon* v. *Astor*, 3 Duer, 477, 574–587 (1854); s. c. 16 N. Y. 1, 22–32 (1857).

[2] Present: THE RIGHT HON. DR. LUSHINGTON, the RIGHT HON. T. PEMBERTON LEIGH, the RIGHT HON. SIR EDWARD RYAN, and the RIGHT HON. SIR CRESSWELL CRESSWELL. Only the opinion is given.

She had a power, under the settlement made on her marriage, to make a will, but the paper in question was attested by only one witness, and was, therefore, not valid.

On the 13th of September, 1856, being then on her death-bed, she duly executed a codicil, thus headed: "This is a codicil to my last will and testament." By this codicil, she gives to her servant, Eliza Baker, the sum of £100, "with as much of my furniture as, in the opinion of my executor, will be sufficient to furnish a sitting-room and a bed-room." The codicil appoints no executor, and contains no other reference to the will.

On the following day, the 14th of September, the testatrix died. On her death, search was made for her testamentary papers by Sir Thomas Herbert Maddock, who was one of the executors appointed by the paper described as her will, and to whom, in pursuance of the testatrix's direction, a letter announcing the event had been sent immediately upon her death. The codicil was found in a chest in her bed-room, and the disputed paper was found in another chest which had been, shortly before her death, removed from her bed-room into an adjoining room. This paper was enclosed in a sealed envelope, on which are written the words, "Mrs. Anne Foote's will."

No other testamentary paper of any description was found.

Under these circumstances, these two papers have been admitted to probate by the judge of the Prerogative Court; and against this decree the present appeal is brought as regards the will.

The objection relied on is, that there is no such distinct reference to this paper in the codicil, as to enable the court to receive parol evidence in order to identify it; that it is not identified by the description of a "will," for that, in truth, it is not a will; that it is not identified either by date or by any reference to its contents, or by annexation to the codicil, so as to distinguish it from other papers of a like description, if more than one were found; and that to admit this paper to probate on the ground that no other is produced to satisfy the description, would be to incorporate the will in the codicil, merely by parol evidence, and not by the effect of the reference contained in the codicil itself.

It becomes necessary to examine, with some minuteness, the rules of law and the decided cases applicable to this subject.

Before the "Act for the Amendment of the Laws with respect to Wills," 7 Will. IV. and 1 Vict., *c.* 26, was passed in the year 1837, no formalities of any kind being necessary in the execution of a will or codicil as to personal estate, the effect of a well-executed testamentary instrument upon one not well executed could hardly come before a Court of Probate. But such questions arose very frequently in the temporal courts, with respect to the disposition of real estate; and the Statute alluded to having placed wills, as to real and personal property, on the same footing, it should seem that the authorities upon this point with respect to real estate, whether before or since the Statute, in the courts of law, are now equally applicable to the Court of Probate, with

regard to personalty. In considering them, however, it is necessary to bear in mind this distinction between cases before the Statute, and subsequent cases, namely, that, before the Statute, a testamentary paper not executed so as to affect real estate, was valid as to personalty; was really a will or codicil, and might, therefore, strictly answer that description in a subsequent reference to it by that name; whereas since the Statute came into operation, no paper not properly executed and attested can, in strictness, be for any purpose a will or codicil.

It is necessary also to remember the distinction between the admissibility of evidence to prove a testamentary paper, and of evidence to explain its meaning, that direct evidence of intention, declarations of the testator by word, or in writing, and other testimony of a similar character, are admissible, when the will is disputed, but that no such evidence can be received in order to explain the expressions which he has used. Still, in construing his will, the court is entitled, and is bound, to place itself in the situation of the testator with respect to his property, the objects of his bounty, and every other circumstance material to the construction of the will, and for this purpose to receive, if occasion require it, parol evidence of those circumstances, and to expound his meaning with reference to them.

In the celebrated treatise of Sir James Wigram, cited at the bar, these rules are stated, discussed, and explained in a manner which has excited the admiration of every judge who has had to consult it. After collecting and stating the effect of the several authorities, Sir James Wigram sums up (as it appears to us with perfect accuracy) the result in these terms: "Every claimant under a will has a right to require that a court of construction, in the execution of its office, shall — by means of extrinsic evidence — place itself in the situation of the testator, the meaning of whose language it is called upon to declare. It follows that — with the light which that situation alone affords — the testator's meaning can be determined by a court; the court which so determines does, in effect, declare that the testator has expressed his intention with certainty, or, in other words, that his will is free from ambiguity." (Prop. v. par. 96.)

It may be said that, on the present occasion, the Court of Probate is, to a certain extent, a court of construction; for it has to determine what is the meaning of the reference made by the testatrix in her codicil, to her last will and testament (the executor under which is to determine upon one of the gifts in the codicil), and whether any, and, if any, what, instrument found at her death is thereby referred to.

This question is one of fact which obviously must be explained, and can only be explained by parol evidence. At first sight there is no difficulty; there is no ambiguity whatever in the expression by which the reference is made. Parol evidence must necessarily be received to prove whether there is or is not in existence at the testatrix's death any such instrument as is referred to by the codicil. For this purpose,

inquiry must be made and evidence must be offered to show what papers there were at the date of the codicil, which could answer the description contained in the codicil; and the court having by these means placed itself in the situation of the testatrix, and acquired, as far as possible, all the knowledge which the testatrix possessed, must say, upon a consideration of those extrinsic circumstances, whether the paper is identified or not. If the will in question had been properly executed, there can be no doubt that it would have been treated as the instrument referred to by the codicil; yet it must, in that case, have been proved, or assumed, that there was no later will revoking it. This last fact is one which is in truth a necessary foundation of the establishment of every testamentary paper.

That a description in a will may be applied to a subject inaccurately described in it, if it should be shown by parol evidence that there is no subject to which it applies with accuracy, can admit of no doubt. "If the description in the will is incorrect, evidence, that a subject — having such and such marks upon it — exists, must be admissible, that the court may determine whether such subject, though incorrectly described in the will, be that which the testator intended." (Wigram's "Extrinsic Evidence in Aid of the Interpretation of Wills," Prop. v. par. 64.)

Is, then, the evidence in this case sufficient to identify the paper propounded as the will? No other paper has been found to which the description can apply; here is a paper kept by the testatrix up to the time of her death in her own possession, to which, according to her view of that paper, it does apply with the strictest accuracy.

If we are to read the codicil with the knowledge of what the testatrix knew, namely, that she had this testamentary paper, and that she had no other, can it be doubted that this is the paper referred to?

It is said, however, that this is merely the effect of parol evidence; and that there may be other wills, and that if there were two there is nothing in this codicil to distinguish which was the will referred to. Unless there were two, both imperfectly executed, and both of the same date (not a very probable event), the question could not arise. As we have already observed, the efficacy of every will, as a last will, depends upon the fact that there is none later. The proof of this must, in all cases, be negative, and necessarily of very different weight, sometimes amounting almost to certainty, as when the will is made on the death-bed; sometimes open to great doubt, as when the will has been made many years before the death; but in every case the court admitting the instrument to probate, must be satisfied that it is the last will.

Supposing the paper propounded as a will in this case had been executed a few hours before the codicil, and that there was positive proof that the testatrix signed no other paper till she signed the codicil, the objection which is now made would, in law, be precisely of the same force.

It has not been disputed that, if the codicil had identified the paper, by describing it as containing certain bequests, such reference would

have been sufficient to let in the proof, yet in such case the proof would equally depend on the assumption that there was no later will which contained similar bequests.

No doubt the rule of law is as stated by Lord Eldon in *Smart* v. *Prujean*, 6 Ves. 565, that "an instrument, properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is, which is meant to be incorporated." For this purpose it is necessary that it should be so described as to leave no doubt in the mind of the judge, in the circumstances as they actually existed and are proved before him, that the paper referred to is the paper propounded.

In the case of *Smart* v. *Prujean*, the testator by his will directed the proceeds of his real estate to be applied to such purposes as he should, by a private letter, which he stated in his will that he intended to leave with the abbess of a convent named, or her successor, appoint. This will, according to the statement of it in the report, does not seem necessarily to have referred to any particular paper then in existence. The letter which he declared his intention to leave might be either one which he had already written, or one which he intended to write. In point of fact the testator never deposited any letter in the custody mentioned in his will, but at his death two papers were found in an envelope, which enclosed also his will, one being a letter addressed to his executors, and another a letter addressed to the abbess in question, both documents bearing date some months before his will, and one of them mentioning that he had devised his worldly estate and effects to trustees upon the uses mentioned in the letter. The letter, therefore, in terms, referred to a will already made, and could hardly be construed to refer to the will actually produced, which was dated many months afterwards. Nor had the letter been delivered over to the abbess, which Lord Eldon thought, by the terms of the will, was an essential part of the condition to give it validity. He, therefore, very naturally asked, if other letters had been proved, how could these be distinguished from them? He did not on that occasion express any doubt that parol evidence might be received, provided the reference in the will was to a paper already existing and sufficiently identified.

In a subsequent case, however, if Lord Eldon's observations are accurately reported, he appears to have intimated some doubt whether a paper antecedently existing, and clearly and undeniably referred to, could be made part of the will, *Wilkinson* v. *Adam*, 1 Ves. & Bea. 445; but, if any such doubt was ever thrown out, later decisions removed it, and completely established the rule that, before the late Wills Act, a paper distinctly referred to by a will might be incorporated in it.

A reference by a testator to his last will, is a reference in its own nature to one instrument, to the exclusion of all others; if so, the description identifies the instrument. It is not like a general reference to codicils, of which there may be several.

In the numerous cases to be found on the subject of republication of a will by a codicil duly executed, and which, in effect, is equivalent to a re-execution of the former instrument, it has never been held necessary that the codicil should refer to the particular paper containing the will, so as to distinguish it from all other wills.

In *Barnes* v. *Crowe*, 1 Ves. Jr. 497, Lord Commissioner Eyre observes: "The testator's acknowledgment of his former will, considered as his will at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; as, by the nature of it, it supposes a former will, refers to it, and becomes part of it; and, being attested by three witnesses, his implied declaration and acknowledgment seem also to be attested by three." It was decided in that case, that the republication of a will by a codicil was not only a recognition of the will, but had the effect of a re-execution, so as to make it speak as from the date of the codicil, and to give a different meaning to a general devise of lands from that which it previously had.

To this doctrine Sir William Grant, though he felt himself obliged to yield to authority, was much opposed, and when he had to consider the case of *Barnes* v. *Crowe*, in the case of *Pigott* v. *Waller*, 7 Ves. 118, he urged very strong reasons against the principle of that decision; but that a codicil to a will, though not referring to it, recognizes a preceding will, and amounts to a republication, he does not intimate any doubt. His words are: "A direct republication, or re-execution, is an unequivocal act, making the will operate precisely as if it was executed on the day of the republication. But a reference to the will proves only, that the devisor recognizes the existence of the will; which the act of making a codicil necessarily implies; not that he means to give it any new operation, or do more by speaking of it than he had already done by executing it." He afterwards observes, page 120: The Lords Commissioners, in *Barnes* v. *Crowe*, appear to have determined "that every codicil, duly attested, ought to be held a republication. Their opinion seems to be, that the codicil was incorporated with the will. The general proposition referred to by Lord Commissioner Eyre, is, that the execution of a codicil should in all cases be an implied republication."

In the case of *Doe d. Williams* v. *Evans*, 1 Cromp. & Mees. 42, a testator prepared a will which he did not sign, and about a fortnight afterwards duly executed a codicil on the same sheet of paper, commencing with these words: "Codicil. — I, David Evans, make a codicil to the foregoing will;" and it was held that the codicil operated to incorporate and establish the will. Mr. Baron Bayley in giving judgment, observes, "The will was written on part of a sheet of foolscap paper, and the codicil was written on the same sheet. Now, if the codicil had not referred to the will, I should have thought that it did not set up that instrument; but if the codicil do refer to the will, then I am of opinion that it does set it up. The language is, 'Codicil —

I, David Evans, make a codicil,' which word implies an addition to a former instrument. It proceeds, 'a codicil to the foregoing will;'" and the learned judge then observes, "The testator, by executing this codicil, appears to me, at that time, in as plain terms as possible, to have set up, not only the codicil, but the will."

In this case there was a distinct reference to the particular paper referred to in such a manner as to exclude all doubt of the instrument intended; but in the case of *Guest* v. *Willasey*, 2 Bingh. 429; s. c. 3 Bingh. 614, this circumstance was wanting. A testator there made his will, duly attested. On the back of this will he wrote three codicils, two unattested, and the last attested. The last codicil revoked the appointment of an executor made by the second codicil, but did not otherwise refer either to the will or codicil. The court was of opinion that the last codicil operated as a republication, not only of the will and of the second codicil, but also of the first.

It is true that in both these cases the several writings were all upon the same sheet of paper, but when the difficulty arises from an absence of the ceremonies required by the Statute of Frauds, this circumstance does not seem of much importance. It may greatly faciliate the identification — it may make the evidence more conclusive, but it can hardly make it more admissible.

Accordingly, it does not seem to have been thought necessary in subsequent cases.

In the case of *Gordon* v. *Lord Reay*, 5 Sim. 274, a testator made his will, dated the 17th of August, 1812, duly executed and attested, by which he devised £10,000 to the plaintiff, charged on certain estates. He afterwards made a codicil, unattested, dated the 8th of April, 1814, by which, after reciting that he had sold the estates so charged, he directed that the legacies should be paid out of and charged on his other real estates. On the 13th of August, 1818, he made a second codicil, duly executed and attested, by which he confirmed the provisions made by his will of the 17th of August, 1812, in favor of the plaintiff, but took no notice of the codicil of the 8th of April, 1814; yet it was held, that a codicil being in law a part of a will, the second codicil, by confirming the will, established the first codicil so as to charge the £10,000 legacy on the real estates.

That case was decided in 1832. In the subsequent case of *Utterton* v. *Robins*, 1 Ad. & Ell. 423, which was argued before the Court of King's Bench on a case sent from the Court of Chancery in 1834, a question of the same kind arose. In that case the testator made a will, dated the 12th of September, 1823, duly executed and attested, and after devising a house in Brompton Terrace to his daughter, Mrs. Utterton, gave the residue of his real and personal estate to trustees. By a memorandum in pencil in the margin of his will, dated the 6th of August, 1825, signed, but not attested, the testator recited that he had sold the house given by the will to his daughter, and gave her instead of it a house in Portugal Street. He afterwards signed

another unattested codicil, dated the 29th of August, 1825, to the same effect, and afterwards made several codicils properly executed and attested, for the purpose of including in the operation of his will, after-purchased estates. The last of these codicils was dated the 5th of February, 1830, and was in these words: "I, John Robins, do make this further codicil to my will, which bears date the 12th day of September, 1823. I give and devise all real estates and hereditaments purchased by me since the date and execution of my said will, to the trustees therein named, their heirs and assigns, to the uses and upon the trusts in my said will expressed and declared of and concerning the residue of my real estates."

The house in Portugal Street had been purchased between the date of the will and of the codicil of the 29th of August, 1825, and the question for the consideration of the court was, to whom the house in Portugal Street passed; it being contended on the part of Mrs. Utterton, that the last codicil, though not referring to any instrument but the will, operated as a republication of all the codicils, whether attested or unattested, and that the house in Portugal Street passed to Mrs. Utterton. The case of *Gordon* v. *Lord Reay* was not cited, and the court did not decide whether such codicil would or would not establish the unattested codicils not referred to; though Mr. Baron Parke may be considered to have intimated an opinion against giving to the codicil what he terms "that immense effect in republication which Mrs. Utterton's counsel ascribe to it;" but the court held, that supposing the codicils in favor of Mrs. Utterton to have been duly attested, the last codicil would have revoked them, and devised the estate in question to the trustees under the will. The learned judges had no doubt that any testamentary paper unattested, sufficiently referred to [in] a duly executed and attested codicil, would be established by such codicil, though the two instruments were not only not on the same paper, but were not even in the same country.

This is the result which we collect from the observations which fell from the judges in the course of the argument, though they contented themselves with sending a certificate of their opinion to the Court of Chancery as to the effect of the devise, without assigning any reasons.

In the case of *Radburn* v. *Jervis*, 3 Beav. 450, decided by Lord Langdale; the cases of *Guest* v. *Willasey*, *Gordon* v. *Lord Reay*, and *Utterton* v. *Robins*, were all cited; and his Lordship was of opinion, that a codicil duly executed and attested, though referring only to the will, operated to establish and republish all previous codicils, whether duly executed or not.

The testator there made a will giving various legacies, and charging his real estates with all legacies thereby given. He made many codicils, some duly executed and attested, and some not; and by one of the latter class he gave a legacy to Mr. Brundrett. His eleventh codicil was duly executed and attested, and began in these words: "This is a further codicil to the last will and testament of me, Sir Thomas Clarges,

Bart., made this 10th day of April, 1828." The codicil was confined to revoking the appointment of two gentlemen named in the will as trustees, and the legacies given to them, and to appointing Brundrett an executor and trustee in their stead. Lord Langdale held, that the legacy to Brundrett was not charged on the real estates, because the codicil did not so charge it, and the will charged only the legacies thereby given; but he was clearly of opinion, that the last codicil operated as a republication of all the preceding codicils, as well as of the will, though none of the codicils were referred to. His language is: "The object of the last codicil, which was duly executed and attested, was to revoke the appointment of trustees and executors named in the will, and the bequests given to these trustees, and to appoint Mr. Brundrett to be executor and trustee; and though, in effect, it operated as a republication of the will and former codicils, and might have extended any prior general devise to lands subsequently acquired before the date of the last codicil, and have subjected such subsequently acquired lands to a general charge contained in the will; yet, considering it as a republication of the will and all the preceding codicils, I do not think the effect is to charge on the land, legacies which by those codicils were not so charged."

Aaron v. *Aaron*, 3 De Gex & Sm. 475, before Lord Justice Knight Bruce, recognizes the rule of law as established in *Gordon* v. *Lord Reay*, and treats it as not inconsistent with the decision in *Utterton* v. *Robins;* and his Lordship observes "that it can make no difference whether the codicil be written on the same paper with the will, or written at a subsequent period, or not."

The cases to which we have referred all turned upon instruments anterior to the late Wills Act; but they show that before that Act, in order to give validity against real estate to a testamentary instrument previously ineffectual for the purpose, such a general reference was sufficient as, when compared with the evidence produced, would enable the court to identify the document; that a codicil would operate as a republication of the will, and that a republication of a will would amount to a republication of whatever antecedent papers might answer the description of codicils, leaving it to be ascertained by parol evidence what might be the particular papers answering the description of either will or codicil.

This doctrine was very much discussed in the case of *Hitchings* v. *Wood*, before the Judicial Committee in 1841, reported in 2 Moore's P. C. Cases, 355; and many valuable observations bearing upon this question were made by Lord Lyndhurst, though, as the case arose before the Wills Act of 1837, and related only to personal estate, it has not the authority of a decision on the point in controversy.

As to the certainty of the reference required by the law in the incorporating instrument, there does not seem to be much distinction, under the Statute of Frauds, between a will and any other instrument. In either case it is necessary, and it is sufficient, that the description should

be such as to enable the court, when the evidence is produced, to say what is the instrument intended.

In the case of *Shortrede* v. *Cheek*, 1 Ad. & Ell. 57, a guarantee in writing referred to "the promissory note," and evidence was offered of a particular promissory note, alleged to be the one in question. It was objected that the writing did not specify what promissory note was meant; that there might be more than one. But the opinion of the court was, that, although if there had been more than one, there would have been difficulty in admitting parol evidence to prove which note was meant, yet as only one was proved, and there was no evidence of any other, the description was sufficient. Mr. Baron Parke observed, in answer to the argument that there might be other notes, "Even if the note had been fully described, you might say that it was possible there might have been another note, and that the contrary should have been shown."

The same doctrine was carried still further by Lord Lyndhurst in the case of *Hodges* v. *Horsfall*, 1 Russ. & Myl. 116. A contract in writing was made, one of the terms of which related to the execution of certain buildings, "as per plan agreed upon." In that case several plans had been drawn out, and discussed at different times, and it was doubtful which was the plan meant. Lord Lyndhurst, in a bill for a specific performance of the contract, held, on the authority of *Clinan* v. *Cook*, 1 Sch. & Lef. 22, that parol evidence was admissible to prove which of the plans was intended, but he thought that the evidence was insufficient to identify the one insisted on, and on that ground dismissed the bill.

It has been supposed that this case is open to criticism, on the ground that the contract did not of necessity refer to any writing, and that to ascertain, by parol evidence, which, of several documents, all answering the description, was intended, is going further than any former case, and is contrary to the opinion, or inclination of the opinion, of the judges in *Shortrede* v. *Cheek* (Wigram's "Extrinsic Evidence in aid of the Interpretation of Wills," Prop. vii. par. 165, p. 127, in note).

For the present purpose it is quite immaterial to consider the value of these objections. In this case it is clear, that the thing referred to is a writing; that it is in its nature a single instrument; and that only one document is found to answer the description.

The cases of *Shortrede* v. *Cheek*, and *Hodges* v. *Horsfall*, are referred to by Lord Cottenham, in *Squire* v. *Campbell*, 1 Myl. & Cr. 480, as only establishing a principle which he seems to consider as settled, that when an agreement refers to some other document, the identity of the thing referred to may be established by parol evidence.

A reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular; but the authorities seem clearly to establish that where there

is a reference to any written document, described as then existing, in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question then is, whether the evidence is sufficient for the purpose.

Supposing the evidence to be admissible as the case would have stood under the Statute of Frauds, has the Wills Act of 1837 altered the general law upon the subject? There are no words in the Act by which any such intention is declared. It has altered the mode in which the instrument containing the will is to be executed, but it has left untouched, as it appears to us, the question what papers are to be held included in the instrument so executed. The Statute of Frauds enacted, that all devises of lands shall be in writing, and signed by the devisor, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in his presence by three or four credible witnesses, or else they shall be void.

The Wills Act, 7th Will. IV., and 1 Vict. § 9, provides, that no will shall be valid unless it be in writing, and signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

The ceremonies necessary to authenticate the instrument are altered, but no alteration is here made in the effect to be given to words used in it. It should seem that a paper which would have been incorporated in a will executed according to the Statute of Frauds must now be incorporated in a will executed according to the new Act.

In those instances in which the Legislature was of opinion that the construction put by decided cases upon the Statute of Frauds, as to the execution of wills, or the rules applied to devises contained in them, required alteration, provisions for that purpose were introduced into the Act.

The incorporation of unattested documents by reference in an attested will, was a subject of very great importance, and had excited much attention, the propriety of which had been sometimes doubted, at least to the extent to which it had been carried. It can hardly be supposed that if it had been intended to introduce so great an alteration in the law, it would not have been introduced by express declaration. But to have introduced any such declaration would have occasioned, in many cases, great inconvenience and injustice.

The only circumstance of which we are aware from which any color can be given to the argument that the Statute had the operation now suggested, is the construction put upon it by this committee, in *Smee* v. *Bryer*, 6 Moore's P. C. Cases, 404, by which it was held that the signature must be so affixed at the end of the will as to leave no blank space for any interpolation between the end of the will and the signa-

ture; and it might be said that such a security against fraud could not be afforded if a paper only referred to in the will could be admitted as part of it. But this construction was found to produce such extensive injustice that, by the Statute, 15th & 16th Vict. *c.* 24, the Legislature interfered to alter the law so established, and this Act passed before the codicil in this case was executed. It was not contended in this case, nor, as far as we are aware, has it been contended in any case since the Wills Act of 1837, that no reference, however distinct, is now sufficient to incorporate another testamentary paper in the paper duly executed as a will or codicil, but the question has always been, what reference in the valid paper is sufficient to let in evidence to identify the invalid paper.

Upon this point an important distinction has been introduced by the Act, to which we have already alluded, namely, that whereas before the Act a paper not duly executed might be a codicil as to personal estate, and might, therefore, be referred to by that description, no such paper can now be properly so designated.

That, with this exception, the law on this subject remains as it was before the Act, appears from an examination of the authorities, although in deciding on the question what is or is not a sufficient description to let in evidence, cases of great nicety are to be found.

In April, 1841, the question now raised came before the Prerogative Court in *Smith's Case*, 2 Curt. 796. In that case the testator, in May, 1838, made a codicil to his will, signed but not attested. In August, 1840, he made a further codicil, signed and duly attested. This was written on the second side of the paper on which the former codicil was written, and the deceased described it as "a second codicil to my last will and testament." Sir Herbert Jenner Fust decreed probate of both codicils, observing: "The latter codicil being duly executed, referring to the former, is an execution of the former codicil also."

In the case of the *Goods of Sotheron*, 2 Curt. 831, the same learned judge recognized the rule as laid down in *Smith's Case*, but held the reference in the will not to be sufficient to let in evidence of the paper propounded.

In January, 1843, in the case of *Claringbull*, 3 Notes of Cases, 1, Sir Herbert Jenner Fust again acted on the rule laid down in *Smith's Case*, referring to it as the interpretation which this court has put upon the Statute of Wills.

In the course of the same year he had to determine the important case of *Lord Hertford's Will*, 3 Curt. 468. The testator had there made a will and twenty-nine codicils. Some of the codicils were made before the Act of 1837, and required no attestation; others were made after the Act, some of which were attested, and others not. One codicil, made at Milan in October, 1838, was unattested. He made a further codicil dated in April, 1839, duly executed and attested, and thereby declared that he ratified and confirmed his will and codicils. The question was whether the Milan codicil was thereby established, and it was

decided by Sir Herbert Jenner Fust that it was not, and upon this principle, that it was not a codicil; that it was not distinctly referred to as such; that there were other papers which were codicils, and which would satisfy the words of the instrument referring to them; and that the court could not, therefore, extend the words of reference to an instrument not answering the description.

In June, 1844, the case on Lord Hertford's testamentary papers came before the Judicial Committee by way of appeal from the decision of Sir Herbert Jenner Fust, and the decision was affirmed (4 Moore's P. C. Cases, 339). Dr. Lushington, in delivering the judgment of the Committee, observed very strongly upon the inconvenience which might result from admitting papers to probate neither properly executed nor distinctly identified; but he also relied on the ground of the judgment in the court below, namely, that there being no reference to the particular paper, except under a general description of "codicils," and there being instruments which properly answered the description of codicils, the words could not be extended to an instrument not properly answering the description.

This was the case mainly relied on by the appellant in the argument before us. It is a decision on every ground entitled to the utmost respect, and we not only hold ourselves bound by its authority, but entirely assent to its principle. We can find, however, nothing in it inconsistent with the rule adopted in the cases of *Smith* and *Claringbull*, which applied under the new Act the principles adopted under the old.

The question came again before Sir Herbert Jenner Fust in the case of *Ingoldby* v. *Ingoldby*, 4 Notes of Cases, 493, in 1846. In that case, the testator made an unattested codicil to his will; he afterwards made a second, properly attested, with the words, "This is another codicil to my will." On his death, these two codicils only were found, and Sir Herbert Jenner Fust admitted them to probate. The learned judge observes: "I think the circumstances of this case are sufficient to distinguish it materially from the *Marquis of Hertford's Case*. There is only one paper here which comes under the description of a codicil. It is not, indeed, a codicil, because it is not duly executed; but it is clear that the testator intended it to be a codicil, not only from the paper itself, but from the indorsement; and it was attached to the will by sealing-wax, without a seal. He describes the second paper as 'another codicil,' evidently referring to what he believes to be in existence. I apprehend there are cases in which a testator has bequeathed property to his children, and there being no legitimate children to answer the description, illegitimate have taken. So here, there being no duly executed codicil, the words may have reference to an unexecuted codicil." The learned judge then adverts to the circumstance that there was a reference in the second codicil to a bequest contained in the first, and adverts to it as a not immaterial circumstance, but does not make it the *ratio decidendi*.

The same question again came before the court in 1849, in the *Case of Phelps*, 6 Notes of Cases, 695. There the testator made his will, duly executed, and afterwards made a first codicil on the same sheet of paper, attested by only one witness. He then executed a second codicil, duly attested, by which he referred to and confirmed the will, but took no notice of the first codicil. Sir Herbert Jenner Fust held, that the first codicil was not established by the second, for the instrument in question was not a codicil; and, therefore, the confirmation of the will did not amount to a confirmation of the codicil.

In the case of *Haynes* v. *Hill*, 7 Notes of Cases, 256, the point once more arose in August, 1849. In that case, a testator made his will and several codicils, the last of which only was attested. The last codicil confirmed the will, but said nothing of the codicils. The question was in truth the same as had arisen in *Phelps's Case*, and the same decision was pronounced. Sir Herbert Jenner Fust went very fully into the doctrine, and held, as it seems on the most satisfactory grounds, that the case was governed by *Lord Hertford's*, there being no reference to anything but the will, and the unattested codicils not being part of it.

These cases, when compared with *Gordon* v. *Lord Reay*, clearly illustrate the distinction introduced by the Wills Act, to which we have already adverted.

In the *Case of the Countess Dowager of Pembroke*, 1 Deane's Ecc. Rep. 182, Sir John Dodson, from whose decision the present appeal is brought, followed the decision of Sir Herbert Jenner Fust in *Sotheron's Case*, but his subsequent decision in the present case shows that he did not mean to infringe upon the rules to which we have referred.

The result of the authorities both before and since the late Act, appears to be, that when there is a reference in a duly executed testamentary instrument to another testamentary instrument by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and that when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified.

As in this case the only question is whether there is sufficient evidence to identify the paper propounded as the will, it is not necessary to consider whether any evidence was received in this case, to which objection might be made. The facts on which we rely are, beyond all question, admissible in evidence, namely, that the paper in question was written by the testatrix, was found locked up in her possession at her death, in a sealed envelope, on which there was an indorsement describing it as her will; and that after diligent search no other paper has been found answering the description, and that the only trace of any other testamentary paper in the evidence, is the proof of an earlier will, which the testatrix destroyed.

Their Lordships, therefore, are of opinion, that the decree complained of must be affirmed, and they think that the costs of all parties must come out of the estate. They cannot properly refer to the extra-judicial opinion of any individual, however eminent, as an authority for their decision; but it is satisfactory to them to observe that (in a work which, though it professes to be written only for the unlearned, may often be consulted by the most learned with advantage) Lord St. Leonards treats as clear, a point which, from its extreme importance, their Lordships have thought it advisable to examine at so great a length. In the "Handy Book on Property Law" (sixth ed. 151), we find the following passage: "So a will or codicil not duly executed, may be rendered valid by a later codicil duly executed and referring clearly to it, or in such a manner as to show the intention. Therefore, if you were to begin your codicil, 'This is a codicil to my last will,' and there was only one will, those words would set up the will, although not duly executed." That very learned author then points out the distinction, where there are several wills and codicils, and refers to the decision in *Lord Hertford's Case*, which he understands as we do.

Sir Fitz-Roy Kelly, Q. C., and *Dr. Jenner*, for the appellant.

Dr. Phillimore and *Dr. Deane*, for the respondent.[1]

GOODS OF ALMOSNINO.

COURT OF PROBATE. 1859.

[*Reported* 1 *Sw. & Tr.* 508.]

IN this case the testatrix died on the 31st of December, 1858. On a table in her room was found an envelope, which had been sealed, but the seal was broken, directed to Mr. Azuelos, No. 62, Bishopsgate Street Without. Within this was another envelope, sealed and directed "For Mr. Azuelos, No. 62, Bishopsgate Street Without. I wish him to open this letter immediately I am dead, or, if he should not be in London at the time of my death, it must be delivered to Mr. S. Almosnino, No. 11, Bevis Marks, City."

On the inner envelope was also written, "I confirm the contents written in the enclosed document, in the presence of Richard Morse and Sarah Praeger, this 29th day of December, 1858.

"A. ALMOSNINO,
"RICHARD MORSE, 8, Charing Cross.
"SARAH PRAEGER, 25, Esher Street, Upper Kennington Lane."

[1] Cf. *Goods of Greves*, 1 Sw. & Tr. 250 (1858); *Goods of Dallow*, L. R. 1 P. & D. 189 (1866); *Singleton* v. *Tomlinson*, 3 Ap. Cas. 404 (1878). The case of *Goods of Sotheron*, 2 Curt. 831 (1841), must be considered as overruled.

Inside this envelope, when opened, was found a paper in the deceased's handwriting, commencing thus: —

"My dear Nephew, — You will be doing me a charity if you will comply with my last wishes; I always found you very kind, and I hope you will not refuse my last request," etc. The paper proceeded to give directions as to her funeral, and the disposition of her property; it was signed by her, but not attested; and mentioned no executor. From the affidavit of Judah Azuelos, it appeared that he was nephew of deceased's husband, and was in the habit of visiting the deceased, who had frequently mentioned to him a paper containing instructions to be attended to after her death, and addressed to him; that on the 29th of December, 1858, he told her that such a paper ought to be signed by two witnesses, when the deceased sent for Morse, and signed the memorandum of confirmation written by Morse on the inside envelope; that the paper writing and the addresses on the envelopes were in the deceased's handwriting; that the seal on the inner envelope remained unbroken when the memorandum was written (the deceased objecting to have it opened), and that the same seal was found unbroken after her death when the inner envelope was cut open.

Richard Morse, at whose house the deceased lodged, deposed that he went into her room on the 29th of December, 1858, at Mr. Azuelos' request, and wrote the memorandum on the inner envelope, which was signed by the deceased in his presence, and that of Sarah Praeger, and that they then attested it; he gave the same account of the condition of the envelopes and seals as Azuelos did, which was confirmed by S. Almosnino, who, after deceased's death, had cut open the inner envelope.

Mr. Dowdeswell moved the court to decree probate of the paper writing and of the inner envelope, as together containing the will of the deceased, to Judah Azuelos, as executor according to the tenor. Parol evidence is admissible for the purpose of showing that the paper writing was the document referred to by the memorandum.

Sir C. Cresswell. Is there any case in which a paper has been held to be incorporated, by reference, with one duly signed and attested, where there was no description whatever of the paper supposed to be referred to? It seems to me to differ from most of the cases cited in *Allen* v. *Maddock*, 11 Moore, P. C. 427; the deceased does not call it a will or testamentary paper, or in any way describe it; the words are simply, "I confirm the contents written in the enclosed document."

Cur. adv. vult.

Sir C. Cresswell. In this case application was made for probate of a paper under rather singular circumstances. The deceased wrote a paper giving directions for the disposition of her property after her decease, and apparently not wishing any one to know the contents, she enclosed it in an envelope on the outside of which, in consequence of a suggestion that any paper to be acted upon after her death ought to be

signed by two witnesses, was written, "I confirm the contents written in the enclosed document," etc.; this was duly signed by the deceased and attested by two witnesses. The question is, whether parol evidence can be received to identify the document purported to be confirmed, and, if so, whether the evidence of identity is sufficient? Where a duly executed paper contains a reference to another testamentary paper the court is at liberty, by parol evidence, to ascertain all the circumstances of the case, so as to place itself, as far as possible, in the situation of the testator, the meaning of whose language it is called upon to declare; for on such occasions the Court of Probate is to some extent a court of construction; but parol evidence is inadmissible to prove intention. In *Allen* v. *Maddock*, all the cases on this point were elaborately reviewed. Here the fact to be proved is the identity of the instrument now produced with the document referred to in the memorandum indorsed on the inner envelope. The parol evidence shows that the envelope was sealed in a particular manner, and that it was found so sealed after the testatrix's death, without any appearance of the seal having been broken. The memorandum refers to only one paper, and one only was found in the envelope when opened. I have no doubt that the document referred to by the deceased was the paper found in the envelope after her death, and shall decree probate as prayed. *Probate granted.*

VAN STRAUBENZEE *v.* MONCK.

COURT OF PROBATE. 1862.

[*Reported* 3 *Sw. & Tr.* 6.]

THIS was an amicable suit, instituted under the direction of the court for the purpose of determining whether two paper-writings of a testamentary character had been incorporated in another paper-writing duly executed according to the Wills Act by the late Mary Elizabeth Monck, the wife of Sir Charles Miles L. Monck, of Belsay Castle, Northumberland, so as together to constitute her last will. It had been arranged that Mrs. Van Straubenzee should propound the papers as plaintiff in the suit, and that Sir Charles Monck should appear as defendant.

The personal property over which Lady Mary Monck had disposing power consisted of certain articles of paraphernalia, and she also had power, under her marriage-settlement, to appoint by will a sum of £5000 charged on her husband's estates, and to be raised and paid after his death.

The facts of the case, as proved by affidavit, were, that on the 6th of May, 1851, Fanny Brown, the housekeeper at Belsay Castle, was requested by Isabella Graham, now deceased, another servant at Belsay Castle, to accompany her to the room where Lady Mary Monck was sitting; that they accordingly went into the room and found her there

alone, sitting at her writing-table, upon which were several papers lying before her, but how many the said Fanny Brown did not recollect; that Lady Mary Monck took from amongst the said papers the said paper marked A, and signed it in the presence of Fanny Brown and Isabella Graham, and requested them to sign their names to it as witnesses, which they thereupon did in her presence, and in the presence of one another. The following is a copy of exhibit A: —

"It is my wish for my dear husband to administer to the moneys, the smaller bequests dear Laura will be so kind as to attend to. — M. E. Monck, May 16th, 1851. Fanny Brown. Isabella Graham.

"Some tapestry work of the Dowager Countess of Tankerville to be disposed of as Sir Charles may think fit, or kept by the family at Belsay."

This last paragraph was not on the paper when signed by the witnesses. Immediately after the witnesses had subscribed their names, Lady Mary Monck took from among the papers lying on the writing-table two sheets of paper with writing on them (but Fanny Brown could not identify them), and enclosed them in the paper marked A, which she sealed with two seals. Some time after the year 1853, Lady Mary Monck gave to her husband exhibit A, sealed with two seals, impressed with the letter M, to deposit in the strong-room. This paper parcel was opened after her death, and was found to contain two pieces of paper, marked exhibits B and C. They commenced as follows:

"Belsay, May 11, 1851.

"Of the £5000 in my power to leave, I bequeath to dear Harriet Straubenzee, to be settled on my god-daughter Mary Straubenzee, £1000; £2000 to Louisa and Alicia Hammond, £1000 each; £500 to Maria and Mary Wrottesley, £250 each; £1000 to Gertrude Gorges, to be settled on her son Arthur."

Then followed a great number of bequests of articles of jewelry and pictures to various persons, including the bequest of torquoise and gold earrings, and concluded thus: "Signed in the envelope, May 16th, 1851;" underneath this, and in a different-colored ink were these words: "P. S. — The water-colored paintings in Duke Street, and whatever else of mine of worth and ornament, to my dear husband. My will revised, April 19th, 1858."

Several alterations in red ink had been made by the deceased subsequent to the original date of the document, and it was clear from the state of the seal that the envelope had been opened after it had been sealed in the presence of the attesting witnesses.

The pleadings are sufficiently referred to in the judgment.

Dr. Tristram, for the plaintiffs.

Dr. Spinks, contra.

Sir C. Cresswell. In this case Mr. Henry Van Straubenzee and his wife propounded the will of the late Lady Mary Elizabeth Monck,

and alleged that in pursuance of the power contained in her marriage-settlement, and of every other authority enabling her in that behalf, she made her last will and testament, dated the 16th of May, 1851, in manner following: that two persons having by her previous request come into the room where she was then sitting, she signed her name to a paper-writing which was then on a table before her, containing the words following: "It is my wish for my dear husband to administer the moneys; the smaller bequests dear Laura will be so kind as to attend to;" in the presence of the said two persons as witnesses, who duly attested the same; and that the said deceased then, in the presence of the said two witnesses, placed two sheets of paper with writing thereon, and which were lying on the said table before the testatrix, within the first-mentioned paper-writing; and that she then, in their presence, folded up the said first-mentioned paper with the two sheets of paper within it, and sealed the same; and that the first-mentioned paper is exhibit A, and that the two others are exhibits B and C, and that the exhibits A, B, and C contain together the last will and testament of the deceased. The defendant, in his answer, admits the due execution of exhibit A, and that the deceased in the presence of the two attesting witnesses placed two sheets of paper with writing thereon, and which were then lying on the table before her, within exhibit A; but denies that the said two sheets of paper are the same as the two sheets of paper marked exhibits B and C, and denies that the exhibits A, B, and C together contained the last will and testament of the deceased.

In support of the case of the plaintiffs, the decision of the Judicial Committee in *Allen* v. *Maddock*, 11 Moo. 427, was relied on, and I was anxious to examine that case carefully, so as to decide the present in conformity with it, for the whole law on the subject was then collected and considered by Lord Kingsdown, in his very learned and elaborate judgment.

The facts in this case, in addition to those admitted on the pleadings, are very few. The papers B and C were found in the envelope A, but it is not shown that they are the same that were originally placed there by the testatrix. The paper B had a date at the commencement, but no other evidence was given of the time when it was written; and I cannot, for the purpose of this cause, hold that any part, still less the whole, was then written. No other evidence was given of the existence of the papers at any particular time than the fact of the envelope containing them having been delivered to Sir Charles Monck by the deceased, some time before her death, and long after the paper A was signed.

Such being the facts of the case, the judgment in *Allen* v. *Maddock* points out the conclusion at which I ought to arrive. It adopts the opinion of Lord Eldon, in *Smart* v. *Prujean*, 6 Ves. 565, that a testamentary paper duly executed, in order to incorporate another, must refer to it as a written document then existing in such terms that it may be ascertained. To that opinion it has been added, by subsequent

decisions, that the identity may be ascertained by the aid of evidence of the surrounding facts, in conformity with the fifth proposition of Sir James Wigram in his work on Extrinsic Evidence, referred to by Lord Kingsdown in 11 Moo. P. C. 441. Such evidence, however, can only be used to aid in the construction of what the testator has written.

In the present case I think the plaintiffs have failed to establish that the papers A, B, and C constituted the will of the deceased, on two grounds. The reference in A is not distinctly to any written paper then existing. One may conjecture that the deceased was referring to something written or to be written, but it is mere conjecture; and certainly there is no such reference to any instrument as will enable the court to ascertain it. The fact of the papers B and C being found enclosed in the envelope can have no effect, according to Lord Eldon's opinion in *Smart* v. *Prujean*, especially as it is not shown when they were placed there. Nor is there any legal evidence to satisfy the court when they were written. Under these circumstances, I feel bound to pronounce against the papers propounded. Paper A does not refer to any written document as then existing; and, assuming that it does, such document is not pointed out in such manner as to enable the court to ascertain its identity; and paper A, taken by itself, has no testamentary character, so as to enable the court to grant probate of it. The costs of all parties should be paid out of the estate.

GOODS OF SUNDERLAND.

COURT OF PROBATE. 1866.

[*Reported L. R.* 1 *P. & D.* 198.]

THE deceased, Mary Sunderland, widow, died on the 7th of April, 1866, having duly executed a will, dated March 9, 1864, and two codicils thereto, dated respectively December 30, 1864, and January 6, 1866. The residuary clause in the will was as follows: "I give all the residue of my personal estate whatsoever and wheresoever (save and except such articles of furniture, pictures, plate, trinkets, linen, and wearing apparel, in my dwelling-house at the time of my decease, as shall be ticketed or may be described in a paper in my own handwriting, to show my intention as regards the same, which intention I expect my executors to give effect to) unto the said H. Freeman, and T. F. Ormerod, &c., in trust, &c."

The deceased left paper writings, marked D and E, purporting to contain gifts of her furniture in her dwelling-house, signed by her, but unattested, and in neither of them was there any reference to either her will or codicils. Mr. Chambers, the solicitor who prepared the will and codicils, deposed that he prepared the will from her instructions;

that on the 26th of February, 1864, he attended on her with the draft of the will for her approval, when she informed him that she had expressed in writing the way in which the furniture and articles referred to in the said clause were to be disposed of, and then produced the papers D and E, and said they were the paper writings referred to in the draft of her will; but that at the time of the execution of the will, on March 9, 1864, the paper writings were not produced to or seen by the attesting witnesses; that on the execution of the codicil of December 30, 1864, the said paper writings were not referred to, or produced to the attesting witnesses by the deceased; but that on the 6th of January, 1866, the day of the execution of the second codicil, whilst his partner was copying out the second codicil for execution in another room, the deceased again produced to him the papers D and E, and again told him the same were the papers referred to in her will, and both the attesting witnesses deposed that at the time of the execution of the second codicil, the papers D and E were lying on a table in the room in which the deceased then was, and within her sight, though she did not, while executing the codicil, make any verbal reference to it.

May 12. *Dr. Spinks* moved that lists D and E should be included in the probate, on the ground that the reference to them in the will was sufficient to prove their identity, and that they were seen by the attesting witnesses at the time of the execution of the second codicil.

Sir J. P. Wilde. This case stood over to enable the court to consider whether it would be justified in granting probate to two lists said to be incorporated in the will. It appears that at the time when the will was executed the two lists had already been written by the testatrix, and were in existence. If the court were at liberty to turn to independent sources of information and investigate the question, whether she intended those papers to form part of her will, independently of the language in which she is supposed to have referred to them, there is abundant parol evidence to satisfy the court that the testatrix did intend these lists to form part of her will. But after consideration, I am of opinion that the court is not at liberty to enter into that question, and to receive that parol evidence. The court cannot properly go further in that direction than the limit fixed by the Judicial Committee of the Privy Council in *Allen* v. *Maddock*, 11 Moo. P. C. at page 454. That limit seems to be fixed by one sentence in the judgment: "A reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular, but the authorities seem clearly to establish that where there is a reference to any written document described as *then existing* in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it." There must be a reference to a written document described as then existing. In *Von Straubenzee* v. *Monck*, 3 Sw. & Tr. at page 12,

Sir C. Cresswell said: "Such being the facts of the case, the judgment in *Allen* v. *Maddock* points out the conclusion at which I ought to arrive. It adopts the opinion of Lord Eldon in *Smart* v. *Prujean*, 6 Ves. 565, that a testamentary paper duly executed, in order to incorporate another, must refer to it as a written document then existing, in such terms that it may be ascertained."

On the authority of these cases, I hold that in order to let in parol evidence to ascertain the truth as far as it can be ascertained by such evidence, with regard to an unexecuted testamentary document, the passage in the will by which reference is made to it, must describe it as a document then existing. I think that these papers are not so described, and I therefore grant probate of the will and codicils alone.[1]

GOODS OF TRURO.

COURT OF PROBATE. 1866.

[*Reported L. R.* 1 *P. & D.* 201.]

THE Dowager Lady Truro died on the 21st of May, 1866, leaving a will dated the 15th of September, 1865, and a codicil dated the 10th of October, 1865. The will contained the following clause: "I likewise bequeath to the present Baron Truro, in affectionate recollection of his kindness to me, all my library and books and maps, except such parts thereof as I shall herein or after or by codicil otherwise dispose of; and also all my engravings, paintings, pictures, and drawings, save and except such parts thereof as I shall herein or after or by codicil otherwise dispose of; also all my household bed and table linen, and also all such articles of silver plate and plated articles *as are contained in the inventory signed by me and deposited herewith.*"

The will was deposited by the deceased at Messrs. Coutts', the bankers, in an envelope with an indorsement in her writing, and in the same envelope with the will was found an inner envelope containing a list of plate. The list, which was in several sheets, was headed "List of plate and plated articles left by my will dated the 15th of September, 1865, to the present Baron Truro. AUGUSTA E. TRURO." The list was signed by the deceased in several places, and on the last sheet was her signature and the date, 21st of September, 1865. Affidavits were filed showing that the will and the list were deposited with Messrs. Coutts on the 21st of September, 1865, and that the codicil was deposited at a subsequent date. One of the affidavits also proved that when the will was executed the attention of the testatrix was called to

[1] See *Goods of Lancaster*, 29 L. J. (P. & M.) 155 (1860); *Goods of Kehoe*, 13 L. R. Ir. 13 (1884). The case of *Goods of Hunt*, 2 Rob. Ec. 622 (1853), must be considered as overruled.

the importance of signing the inventory and depositing it with her will, and that she intimated her intention of acting upon that suggestion.

The Queen's Advocate and *Dr. Spinks* moved for probate of the will of the 15th of September, 1865, the list of plate dated the 21st of September, 1865, and the codicil of the 10th of October, 1865.

Sir J. P. Wilde. I have very serious doubts whether I could allow this list to form part of the probate if the question depended upon the words of the will, because, although to some extent they point to an existing document, I should, construing them by the existing facts, read them as meaning, not that the document had been signed at the time when the will was executed, and would be deposited with it, but as meaning that it would be signed and deposited when the will should be deposited. There is no distinct reference to an existing document. For, though the testatrix, in using the words, "signed by me, and deposited herewith," would *prima facie* seem to mean "now already signed and deposited," yet those words, like all others in a written document, must be construed in connection with the existing and surrounding state of things. Now, the will could not have been deposited at the time at which the testatrix was speaking, and the list when produced was plainly not signed till the 21st of September. The true meaning, therefore, of the words, as spoken at that date, would seem to be, "a list which I intend to sign and deposit," &c. It is, however, unnecessary to decide whether the list is incorporated with the will, because I am of opinion that it is entitled to probate by force of the codicil.

This makes it material to look into the decisions on the subject. The general rule as to the consequences of republication is thus laid down by a most careful and learned text-writer: "It has long been settled law that the republication of a will is tantamount to the making of that will *de novo*; it brings down the will to the date of the republishing, and makes it *speak*, as it were, *at that time*. In short, the will so republished is a new will." (Williams on Executors, part i. b. ii. § 2, page 188, 5th ed.)

He then goes on to refer to numerous cases which have been decided in accordance with this principle, and amongst others to *Skinner* v. *Ogle*, 4 N. of C. at page 79, where it was held that "a codicil duly executed will give effect and operation to a will altered after the passing of the Act, although the alteration was not duly attested, and though the will itself was executed before 1838," and to *In the Goods of Hunt*, 2 Robert. 622, where Sir John Dodson held that a codicil duly executed will give effect to unexecuted papers which have been written between the periods of the execution of the will and the codicil, although the latter does not refer to the former.

The question came before Sir C. Cresswell in March, 1863, *In the Goods of Stewart*, 3 Sw. & Tr. 192, and in June, 1863, *In the Goods of Matthias*, 3 Sw. & Tr. 100. In the first case, the will contained this clause: "I direct my executors to distribute all pictures, books,

and other articles according to any list or lists signed by me." A paper was found without any date, but which was executed before a second codicil, headed "List referred to in my will and codicil." The second codicil commenced "This is a codicil to the last will and testament of me . . . I hereby confirm my last will with all the codicils thereto duly signed by me." "Held that the unattested paper was sufficiently identified and referred to in the will, and having been signed before the execution of the codicil was entitled to be admitted to probate as a portion of the will confirmed by the codicil."

In the second case the testatrix executed a will in 1848, in which she requested her trinkets to be divided "as I shall direct in a small memorandum." She executed a codicil in 1853, and another in 1862. On her death the will and two codicils and a paper headed "Memorandum of trinkets referred to in my will" were found folded together in a locked portfolio. There was no evidence to show that the memorandum was in existence when the will was executed, but there was evidence from which it might be inferred that it was in existence before the date of the last codicil, but the last codicil did not refer to it. It was held "that the re-execution of the will by the last codicil could not make that a part of the will which was no part of it before, and that the memorandum ought not to form part of the probate." The learned judge is reported to have said: "Assuming it as a fact that the memorandum was in existence before the date of the last codicil, can that entitle it to form part of the probate? There is nothing to show that the memorandum was in existence when the will was signed; it therefore formed no part of the will. How can the execution of the codicil, which is a re-execution of the will, make that to be a part of the will which was no part of the will before, and the codicil contains no reference to the memorandum?" And accordingly probate of the memorandum was refused. Now there is no doubt that probate could not have been granted of that memorandum, because, treating the will as having been re-executed at the date of the second codicil, the reference was not sufficient to incorporate it according to the rule laid down in *Allen* v. *Maddock*, 11 Moo. P. C. 427. But if the language of the learned judge was intended to have a universal application, if it is to be taken as laying down a general rule that by the kind of re-execution of a will which is involved in the execution of a codicil nothing can be inferentially added to a will which it did not contain before, it is at variance with the decision of the same learned judge in *In the Goods of Wyatt*, 2 Sw. & Tr. 495. In that case a testator executed a draft will in April, 1847, and an engrossed will in May, 1847. In September, 1854, he executed a codicil purporting to be a codicil to his last will of April, 1847. The draft will contained interlineations and cancellations in the testator's handwriting in ink and in pencil. Both wills were in the handwriting of the same person, who deposed that he copied the engrossed from the draft will. The engrossed will agreed with the draft will as altered in ink but not as altered in pencil. Pro-

bate was decreed of the draft will of April, 1847, including the alterations in ink, in so far as they agreed with the will of May, 1847, together with the codicil of 1854, but not those in pencil. If the proposition laid down by the learned judge in *In the Goods of Matthias* is a general one, that decision cannot be supported. I think that the proposition is not a general one, but must be read in reference to the case to which it refers.

After considering these cases I have come to the following conclusion as to the rule by which the court should in future be guided in dealing with the republication of a will by a subsequent codicil.

It is plain on the one hand that the republication of the will, which is involved in the execution of a codicil, may have the effect of adding something to the will which formed no part of it when executed, and which is not to be found in the codicil itself. The case just quoted, *In the Goods of Wyatt*, 2 Sw. & Tr. 494, in which the codicil was held to give effect to alterations made in the will after its execution, is a direct authority for this proposition. On the other hand it is plain that there must be a very distinct limit to the action of the court in this direction. For the tendency of such a doctrine, if not restrained, would be to place unexecuted papers on the same footing with those which have received due execution, merely because they were in existence at the subsequent date of the execution of a codicil. The court cannot, according to the authorities, give greater or less effect to a codicil than this: to treat its execution as if the testator had at the same time sat down and re-executed his will. Looked at in that light, the following rule would appear to be the consequence: Where the will, if treated as executed on the date of the codicil, and read as speaking at that date, contains language which, within the principle of *Allen* v. *Maddock*, would operate as an incorporation of the document to which it refers, testamentary effect may be given to such document. But when this is not the case, the mere fact of unexecuted papers having been written or signed between the date of the will and that of the codicil, will not suffice to add such papers to the will by force of republication, or to make that testamentary which would not have been so if the will had been originally executed at the later date.

Applying that doctrine to the present case, and treating this will as having been re-executed on the date of the codicil, its language runs thus: "And also all such articles of silver plate and plated articles as are contained in the inventory signed by me and deposited herewith." Now, construing these words by the light of the events which had then happened, they appear with sufficient distinctness to refer to a document then existing. For the inventory referred to had then been signed by the testatrix and deposited at the bankers. The operation of the codicil as a re-execution of the will, therefore, gets rid of all difficulty, and I admit the will and the codicil to probate, together with the inventory signed by the testatrix.

GOODS OF MARY REID.

COURT OF PROBATE. 1868.

[*Reported* 38 *L. J.* (*N. S.*) (*P. & M.*) 1.]

MARY REID, late of Oxford Parade, Cheltenham, in the county of Gloucester, widow, died on or about the 19th of October, 1867, leaving a duly executed will and codicil. The will bore date the 24th of May, 1864; the codicil was not dated, but it appeared from the affidavit of the attesting witnesses that it was executed in the latter part of April or the beginning of May, 1866. By her will she gave all her ready money to her executors, "to pay her funeral expenses, &c., as also some small sums as remembrances to friends, to be named in a letter addressed to my two nieces, Margaret G. Thain and Lilias Thain," whom she appointed residuary legatees. In disposing of certain sheep in Australia, she divided the flock into four parts. Three of these she specifically bequeathed, and then continued, "the other portion to be given to my residuary legatees, to be appropriated by them as specified in my letter."

The codicil ran thus: "In consequence of some deaths in our family, it is necessary that I add a short codicil to my will, &c. In the first place, my set of pearl ornaments, which I then left to Mary Ewerctta Thain, in consequence of her early and melancholy death, so much lamented by us all, Inmust now destine to someone else, and as Mrs. Thain has no female in her family that either she or I would wish to possess those family jewels, *I now leave them as intimated in the letter addressed* to my residuary legatees."

The will and codicil were found in an envelope in a sealed parcel. In the same parcel, but in a separate envelope, two unexecuted testamentary papers were also found. Paper No. 1 bore date the 1st of March, 1866, and commenced thus: "To my dear nieces, Margaret G. Thain and Lilias Thain, named in my last will and testament as my residuary legatees, and to whom I there stated it was my intention to address to them a letter which I wish to be equally binding and legal as if its contents had been expressed in the will itself. This my intimated intention I now shall endeavor to perform." The paper gave trifling legacies to certain friends and acquaintances, and also referred to her pearls, — this reference and some other portions of the document being in pencil.

Paper No. 2 simply expressed a wish that the fourth part of the sheep in Australia might go towards forming a fund to pay off a debt on a cottage, and had at the foot of it "Cheltenham, 1865." Both papers were in the handwriting of the deceased.

Dr. Swabey moved for probate of the will and codicil, together with the two unexecuted testamentary papers as incorporated by reference.

Although the will does not refer to an existing paper, the unexecuted documents were written before the codicil, and in it the reference "I now leave them as intimated in the letter addressed to my residuary legatees" is a reference to an existing document.

Sir J. P. Wilde. I think that those papers cannot be admitted to probate as part of the will. Dealing with the case as it appears on the face of the will, the unquestionable rule of law is that the will must refer to a paper as existing at the time, and then that the reference must be in such terms that the paper referred to can be fairly recognized. Now this will does not refer to an existing paper at all. It is said very truly that the language of the will is future, and points to a future document; and, further, the document which is asked to be incorporated refers to the fact that the testatrix intended to write such a paper, and it then goes on to say that this is the document which she so intended. It is quite plain therefore that the document referred to in the will was of a future character. But then comes the codicil. In *The Goods of Lady Truro*, 35 Law J. Rep. (N. S.) Prob. & M. 89; s. c. 1 Law Rep. Pr. & Div. 201, it was decided that the effect of a codicil was to make the will speak as if executed on the date of the codicil, but that is all. It was there said, "Where the will, if treated as executed on the date of the codicil and read as speaking at that date, contains language which, within the rule of *Allen* v. *Maddock*, 11 Moo. P. C. 427, would operate as an incorporation of the document to which it refers, testamentary effect may be given to such document. But when this is not the case, the mere fact of unexecuted papers having been written or signed between the date of the will and that of the codicil, will not suffice to add such papers to the will by force of republication, or to make that testamentary which would not have been so, if the will had been originally executed at the later date." But the language of this instrument, read it as you will, is language of a future character, and therefore it seems to me that it cannot fall within the rule laid down in the case to which I have referred. It is quite true that the effect of the codicil is to bring down the will to that date, and that the codicil speaks of leaving certain jewels "as intimated in the letter addressed to my residuary legatees;" but then the language is ambiguous. It might point to an existing paper, but it might also point to a future paper, and the testatrix herself, when she was obviously speaking of a future paper in the will, used similar language — "the other portion to be given to my residuary legatees, to be appropriated by them as specified in my letter." The court cannot see on the face of the will or codicil any distinct reference to an existing document, and still less that these documents existed at the time of their execution. Under these circumstances, the court can only grant probate of the will and codicil.

BURTON *v.* NEWBERY.

CHANCERY DIVISION. 1875.

[*Reported* 1 *Ch. Div.* 234.]

JOSHUA MALDEN, by his will, dated the 7th of December, 1837, and duly attested, devised certain real estate, specifically described, and all and singular other his messuages, lands, tenements, hereditaments, and real estate to George Newbery and John Ryland, and their heirs upon trust to receive the rents and profits thereof during the lives of his daughters, Elizabeth Burton and Mary Morton, and apply such rents upon the trusts therein mentioned, and from and after the decease of Elizabeth Burton and Mary Morton upon trust to sell the same, and hold the proceeds of sale upon the trusts of his (the testator's) residuary personal estate; and the testator thereby bequeathed his residuary personal estate upon certain trusts during the lives of Elizabeth Burton and Mary Morton; and after their death he directed the same to be equally divided between such of his thirteen grandchildren therein named (two of whom were William Burton and Ann Burton) as should being grandsons attain twenty-one, or being granddaughters attain that age or marry.

By a codicil dated the 12th of October, 1838, and attested by Elizabeth Burton, William Burton, and Ann Burton, the testator directed that the rents of certain real estate purchased by him on the 13th of July, 1838, and the 10th of October, 1838, should be disposed of in the same manner as the rents of all his other estates; and he further desired that his executors should sell such real estate, and dispose of the proceeds in the same manner as the moneys arising from all his other estates.

The testator made another codicil, dated the 1st of April, 1839, and in the following terms: "This is a codicil to my last will dated 7 December, 1837: and I hereby give and bequeath unto my daughter Elizabeth Burton £600, which I desire my executors to pay to her within twenty-four months after my decease." This codicil was duly attested by two witnesses.

The testator died shortly after the date of the last codicil. Of the thirteen grandchildren named in the will, twelve (including William Burton and Ann Burton) attained twenty-one.

The suit was instituted for the administration of the trusts of the testator's will, and now came on to be heard on further consideration. Elizabeth Burton and Mary Morton were both dead; the testator's real estate had all been sold; and the question was, whether the testator had effectually devised to William Burton and Ann Burton two twelfth

shares of the proceeds of the property comprised in the codicil of the 12th of October, 1838.

Waller, Q. C., and *Hamilton Humphreys*, for William Burton and Ann Burton.

Chitty, Q. C., and *Everitt*, for some of the other grandchildren.

Southgate, Q. C., *Shebbeare*, *Jolliffe*, *Stallard*, *Whitehorne*, and *F. W. Stone*, appeared for other parties.

Jessel, M. R. The case I have before me is one of some little singularity, and perhaps of some novelty, and it compels me to consider some of the prior authorities, and to say how far they appear to me to be consistent with principle. The 15th section of the Wills Act in effect makes void any gift by a testamentary instrument to attesting witnesses and certain other persons, such as the wives and husbands of attesting witnesses; but it does not in any other way affect the validity of the testamentary disposition. If, therefore, a testator makes a testamentary disposition containing a gift to the attesting witness, the attesting witness takes nothing under it.

This particular testator having made his will on the 7th of December, 1837, before the Wills Act, made a first codicil, which bears date the 12th of October, 1838, and thereby gave benefits to the attesting witnesses. It is clear, if nothing more had been done, that those benefits would not have been taken by them. He then made a second codicil, not, however, calling it a second codicil, which bears date the 1st of April, 1839, and it is in these terms: [His Lordship read it as set out above.] The first point raised on behalf of the claimants is this: they say that the effect of this second codicil is equivalent to a re-execution of the first codicil, in other words, that the second codicil is not only equivalent to the re-execution of the will standing alone, but of the will plus the first codicil, and the question I have to decide is, whether that is the effect of the second codicil. I wish I could say that the law on the subject was clear; that it was perfectly consistent with principle; and that the authorities were not to a great extent conflicting. I cannot say so; but I can say what is my opinion of the law derived from those conflicting authorities, and having regard to principle.

Now it appears to me that any testamentary instrument properly attested may incorporate into it by reference as a part of the testamentary instrument any prior writing, whether such prior writing be attested or not, and that if the incorporation is made in such a manner that the court can find out from the properly attested instrument what is the prior instrument intended to be referred to, then the prior instrument becomes a part of the testamentary instrument to all intents and purposes.

That I take to be the principle, and the question is whether such reference is necessary. I think it is, and as I read the judgment of Baron Bayley, in the case of *Doe* v. *Evans*, 1 Cr. & M. 42, he puts the law very much in the way I have stated. The will was written on part of a sheet of foolscap paper, and the codicil was written on the

same sheet, and the learned judge says: "Now, if the codicil had not referred to the will, I should have thought that it did not set up that instrument; but if the codicil do refer to the will, then I am of opinion that it does set it up." In other words, the mere fact of its being a codicil alone will not do; it must refer in some shape or another to the instrument which is set up. In the case of *Aaron* v. *Aaron*, 3 De G. & Sm. 475, which came before Vice-Chancellor Knight Bruce, he recognized the authority of *Doe* v. *Evans*. Whether he also intended to recognize the authority of *Gordon* v. *Lord Reay*, 5 Sim. 274, I am not sure. After reading at length the judgment of Baron Bayley, in *Doe* v. *Evans*, he says (3 De G. & Sm. 479): "Now, it can make no difference whether the codicil be written on the same paper with the will or written at a subsequent period or not. Here a codicil is referred to, and there is no dispute what the instrument was." Then he reads the codicil at full length, and you find that it begins thus: "Whereas I, John Aaron, have made and duly executed my last will and testament in writing, bearing date the 23d day of August, 1828, and also a codicil annexed thereto, bearing date the 21st of May, 1831." Then he says, "It is perfectly clear, in my opinion, what the instrument here mentioned is." Of course; it was described as a codicil. Then he goes on, "The intention of the second codicil, as collected from the whole of it, was to confirm the first codicil. That is done by an instrument duly attested. Now, whatever I might have thought of this question independently of the case of *Gordon* v. *Lord Reay*, and the observations of Bayley, B., in the case in the Exchequer, I must, if I am to decide myself without having the opinion of a court of law, say that the effect of the will and second codicil was to place the first codicil in the same situation as if it had been attested by three witnesses." He does not say there whether he does or does not approve of *Gordon* v. *Lord Reay;* but these two cases of *Doe* v. *Evans* and *Aaron* v. *Aaron* are entirely in accordance with what I consider to be the principle, which is, that the setting up instrument must contain a distinct reference to the prior writing, so as to show that the testator intends that prior writing to be a part of his testamentary disposition.

Gordon v. *Lord Reay* is a case very difficult to deal with. In argument, undoubtedly the point was taken by Sir Edward Sugden for the defendants. He says that an instrument duly attested can only republish an instrument not duly attested to which it expressly refers.

In *Gordon* v. *Lord Reay* there was a codicil, which, as the law then stood, was perfectly valid as regarded personal estate; but it was not valid as regarded real estate for want of due attestation. Then there was a second codicil, which was in these terms: "Whereas I have in and by my last will and testament, bearing date the 17th of August, 1812, made several provisions and bequests in favor of Susan Harriet Hope," &c., "now I do hereby confirm such bequests and provisions,"

"and I do hereby ratify and confirm this by my hand and seal, dated the 13th of August, 1818," and there is nothing more. A reference is made to provisions made by the will, with the date of it, and a confirmation is made of those provisions. The testator had also made substantial provisions for the lady by the first codicil, but I confess I cannot find, on the face of the second codicil, any reference whatever to the first codicil, nor can I find any reference to any will which would include the codicil, because the only will referred to is a will bearing date the 17th of August, 1812, which was the date of the original instrument, and the codicil was dated the 8th of April, 1814. Therefore it is not (as was put to me in argument) the case of a man saying simply "I confirm my will," and it being held that the term "will" included every testamentary disposition, whether contained in a thing called a will as distinct from a codicil, or in a thing called a will, being a will plus several codicils. The only reference was to a will bearing date a certain day, that is, as I understand it, to a described instrument, which excludes instruments of subsequent date. I am obliged to say this, because I admit that the decision was the other way. Unfortunately, we have no reasons given. The judgment of the Vice-Chancellor is in these terms: "My opinion is that the second codicil does republish the first. The first codicil is part of the will." [It was part of the will for the purpose of the personal estate, but not part of the will for the only purpose for which the Vice-Chancellor had to consider it — that is as regarding real estate.] "And if the second codicil is a republication of the will, it is a republication of everything which is part of the will. The second codicil does refer to the will; it ratifies and confirms the will, and everything that is part of it." It does appear to me that that is a fallacy, that where you describe a will by its date you do not describe the subsequent codicil as being included in that will. It may well be, that where you describe a will generally, without date, and say, "I confirm my will," you might interpret the word "will" as including the whole of the testamentary disposition; but it does appear to me that that was not the case in *Gordon* v. *Lord Reay*, and I cite, in reference to this point, the observations made in the case of *Crosbie* v. *MacDoual*, 4 Ves. 610, and those made by Lord Selborne in the recent case of *Farrer* v. *St. Catharine's College*, L. R. 16 Eq. 19. They both go to this, that a mere reference to an instrument with a date is not a reference to the subsequent instrument. The point in *Crosbie* v. *MacDoual* was this: The testator made a will; he then made several codicils, the fourth of which revoked certain annuities given by the will, and then, last of all, he made a codicil confirming the will, but not all the codicils, and the question was whether he had revived the gift which had been revoked by the intermediate codicil. It was held he had not: and the then Master of the Rolls distinguished the case from the case of *Lord Walpole* v. *Lord Orford*, 3 Ves. 402, where a man having made two wills, and unfortunately not having destroyed the first, made a codicil, and the transcriber having the first

will before him, as well as the second, by mistake (of which they would not allow evidence to be given), confirmed the first will, which was inconsistent with and had been revoked by the second; and it was held that the confirmation of the first will, though it had been revoked, set it up again. It was a writing which, though revoked and good for nothing, was as much incorporated by the codicil as though it had been written out again in words, and consequently it revoked the intermediate and inconsistent will. But, as pointed out by the Master of the Rolls, that does not apply to a will and codicil followed by a second codicil inconsistent with the prior codicil; there is no occasion in such a case to assume that you do revoke the intermediate codicil. So in a case where you make a will with subsequent codicils, you may intend merely to revoke the will, and leave the codicils standing, which was the decision in *Farrer* v. *St. Catharine's College*. There, the argument was pressed that the revocation of a will, being the revocation of everything which is part of it, must revoke all the codicils. The answer was, you do not revoke the will in that sense, but you revoke an instrument called a will of a certain date; therefore the revocation does not go beyond that. I must say it does not appear to me that the case of *Gordon* v. *Lord Reay* was decided according to principle, and that the true principle was that which was laid down by Baron Bayley in *Doe* v. *Evans*, which has been certainly followed, whereas I am not able to find that the case of *Gordon* v. *Lord Reay*, though quoted, has ever been followed at all.

Then there is a second point, which is this: The codicil gives certain after-acquired lands substantially on the same trusts on which the testator had given the residue of his real estate. According to the doctrine now established by *Christie* v. *Gosling*, L. R. 1 H. L. 279, you are to read the words referred to as if they were incorporated in the instrument. The consequence would be that the attesting witness would take a share of the money to arise from the sale of the lands; but then that share is forfeited by the law. What becomes of it? It falls into the residue. Any lapsed or void gift falls into the residue, and consequently the shares of the attesting witnesses will be divided among all the residuary legatees. But it was said that the residuary legatees cannot take under the first codicil, which directs the money to be divided in accordance with the provisions of the will without carrying out all these provisions. That appears to me to be a fallacy. It is not, in fact, a case of election at all, they take simply what is given to them by the instrument. The dispositions of that instrument are not effectual to the extent to which a share of the property is given to the attesting witness, not by reason of the terms of the will or codicil, but by reason of the law which annuls the gift. You have, therefore, to look, not at the meaning of the codicil, but to the effect of the codicil with the addition of the statutory enactment which annuls a portion of its effect, and you have to read it in exactly the same way as if these persons had been excepted from the portion of the will incorporated by

reference, consequently they can by no possibility be held to take anything under such words of reference. Therefore I hold that their shares are simply void gifts and fall into the residue, and are divisible among them as well as the other residuary legatees.

GOODS OF HEATHCOTE.

PROBATE DIVISION. 1881.

[*Reported* 6 *P. D.* 30.]

SOPHIA MATILDA HEATHCOTE, late of North Luffenham Hall, in the county of Rutland, widow, died on the 20th of November, 1880.

The deceased had under her marriage settlement an absolute power in the event of her husband surviving her of disposing by will of their settled property, and on the 17th of November, 1874, she made, in the lifetime of her husband, a will bequeathing that property. She survived her husband, and therefore the power never took effect, and the will was invalid. On the 1st of November, 1880, she, being then a widow, made a codicil to the will. This as well as the will was in her own handwriting, and was written upon the same piece of paper as the will immediately after it. It began with the words "This is a codicil to the last will and testament of me," &c., but contained no other reference to the will. It was, however, agreed by all parties that no later will than the will of the 17th of November, 1874, had been made by the deceased, and that an affidavit to that effect could be supplied.

Inderwick, Q. C., and *Searle*, moved for probate of both documents.

Bayford, for other parties interested, supported the application.

Dr. Tristram and *Pritchard*, contra, for parties whose interests would be prejudiced by probate of both documents.

THE PRESIDENT. The only question raised for my determination is whether I am satisfied that the will of 1874 is sufficiently identified as the last will and testament which is referred to in the codicil.

The case is governed by the passage in *Allen* v. *Maddock*, 11 Moo. P. C. 426, at page 441; and on the present occasion the Court of Probate is to a certain extent a court of construction: for it has to determine what is the meaning of the reference made by the testatrix in her codicil to her last will and testament, and whether any, and if any, what instrument found at her death is thereby referred to.

This question is one of fact, and can only be explained by parol evidence, which must necessarily be received to prove whether there is or is not in existence at the testatrix's death any such instrument as is referred to by the codicil. For this purpose, it must be shown what papers there were at the date of the codicil which could answer the description contained in that document, and the court having by these means placed itself in the situation of the testatrix, and acquired as far

as possible all the knowledge which she possessed, must say, upon a consideration of those extrinsic circumstances whether the paper is identified or not.

In the case of *Stockil and Others* v. *Punshon and Others*, 6 P. D. 9, it was of no importance which way the court decided. I therefore did not consider the question of what extraneous evidence would be sufficient to connect the one document with the other, but I acted on the impression that the bare fact of enumeration was not sufficient to incorporate the second paper. But in this case it is to be taken by admission that there is no other known instrument to which this reference made in the codicil could apply, and it is upon that assumption that I decide that this will so referred to in the codicil must be admitted to probate.

An affidavit of the character mentioned by Mr. Inderwick must, however, be supplied.

F. *Competency of Witnesses.*

HOLDFAST d. ANSTEY *v.* DOWSING.

KING'S BENCH. 1746.

[*Reported* 2 *Str.* 1253.]

EJECTMENT for lands in Cambridgeshire on the demise of Christopher Anstey, D.D., and Mary his wife. And upon a trial at bar the jury found this special verdict.

That James Thompson, Esq., being seised in fee of the premises in question, and of sound mind, signed, sealed, and published a paper writing, purporting to be his last will, dated 10 February, 1742, and which is found *in hæc verba:* by this he declares, that he devises to the defendant the lands in question for life, remainder to his first and every other son and sons in tail male, remainder to his daughters as tenants in common, with a reversion in fee to the right heirs of the devisor: then he charges all his real and personal estate with particular annuities and legacies, and particularly an annuity of £20 *per annum* to Elizabeth the wife of John Hailes for her life and to her separate use; and he also gives a legacy of £10 each to John Hailes and his wife for mourning. That to this will there are three persons who subscribe their names as witnesses, whereof John Hailes is one; and that in their presence, and of nobody else, he signed, sealed, and published the paper writing as and for his last will; and they three attested the same in his presence, and are all three living. They find the identity of John Hailes the legatee and subscriber, and that Elizabeth his wife is still living. That the devisor died May 28, 1743, without issue, and seised as aforesaid, and that Mrs. Anstey (one of the lessors) is his

aunt and heir-at-law. They find that before and at the time of the trial the defendant made a tender to John Hailes of £20 for his and his wife's legacies, which he refused to accept, and that those legacies are not discharged. Then they find the entry and demise by the lessors, &c., *sed utrum*, &c.

This cause was three times argued at the bar, and this term the CHIEF JUSTICE delivered the resolution of the court.

The question upon this special verdict is, whether in the light Hailes now stands, he is to be considered as a credible witness within the intent of the Statute of Frauds. And we are all of opinion he is not.

The right to devise in this case is not a common law right, it being inconsistent with the notion of a feudal tenure (Wright's Tenures, 174); but it depends upon powers given by Statutes, which must all be considered together, as creating one general parliamentary rule: the particulars of which are, that it must be in writing, signed, and an attestation of three credible witnesses in the presence of the devisor. These were checks introduced to prevent men from being imposed upon; and certainly meant, that the witnesses (who are required to be credible) should not be such as claim a benefit by the will. Though a will may be read, on proof of all the circumstances by one witness; yet that is upon a supposition, there are two others, who could be allowed to give the same testimony.

If the tender would be equal to the payment of the two money legacies (as it is not), yet the annuity charged upon the estate devised would still subsist; and though it is charged both upon real and personal estate, and the personal (which is not found to be sufficient) would be the first fund, yet it is for Hailes' advantage to enlarge the fund by taking in the real estate; and we must at law consider the husband as benefited by the annuity, though given to her separate use; for it is his money the moment it is paid into her hands, or if not, it eases him in point of maintenance.

It was objected, that nothing vests till the death of the devisor, and therefore at the time of the attestation he had no interest. But the answer is, that he was then under the temptation to commit a fraud, and that is what the Parliament intended to guard against.

Another way by which it was attempted to be supported is, that it may be void as to the annuity, but good as to the devise to the defendant; which is grounded upon an expression in Carthew's report of the case of *Hilliard* v. *Jennings*, 514, that the will was void *quoad the devise of lands to the plaintiff*. But whoever reads that will from the record will see, that there were no other lands devised, and therefore it is equal to saying it is void as to any passing of lands; and it was proper to confine the invalidity of it to lands, because as to personal estate it was certainly a good will.

Consider what a door this would open to fraud: a man has four estates, and is beset by four, who fraudulently procure a will, whereby each has a separate estate devised to him. If one is allowed to be a

witness for the other three, they thereby establish it for the whole. In 1 Ld. Raym. 730, it is held, that there must be an ability as to the whole will, and not as to a particular legacy. In the case of a will consisting of several sheets of paper, as 3 Mod. 263, the party benefited in one sheet cannot be set up to prove every other sheet.

It was agreed, this man could not be examined; how then is he that credible witness that the Statute requires?

The true time for his credibility is, the time of attestation; otherwise a subsequent infamy, which the testator knows nothing of, would avoid his will.

And as to what is said in Swinb. 296, it relates only to wills of personal estate, and cannot affect the construction of the Statute.

The Digest, lib. 28, tit. 1, l. 22, *De testibus, subscriptione, et signis*, is express: *Conditionem testium tunc inspicere debemus, cum signarent, non mortis tempore*, and so is the Code, lib. 6, tit. 23, l. 1.

We therefore hold this not to be a good attestation of a will of lands; and then the title of Mrs. Anstey the lessor of the plaintiff as heir-at-law is not defeated by what is set up as a will; and consequently the plaintiff must have judgment.[1]

[1] A writ of error was brought in the Exchequer Chamber and there argued, but the cause was compromised before judgment. *Holdfast* v. *Dowsen*, 1 W. Bl. 8, 15 (1747). This case gave rise to the Statute of 25 Geo. II. *c.* 6 (1752), p. 126, *ante*. In *Wyndham* v. *Chetwynd*, 1 W. Bl. 95; s. c. 1 Burr. 414 (1757), it was *held* by Lord Mansfield and the Court of King's Bench on an issue of *devisavit vel non* to try the validity of an alleged will of Mr. Chetwynd, who died in 1750, that attesting witnesses who were creditors at the time of the attestation, but whose debts had been paid off at the time of the trial, were credible witnesses within the Statute of Frauds. The will charged the testator's real estate with the payment of debts.

In *Doe* d. *Hindson* v. *Kersey* (1765) John Knott, by his will, dated 1734, devised land to six trustees in trust to dispose of the rents and profits to poor orphans, aged and impotent people, within the township of Mauls Meburn, and to put out the children of such poor people apprentices. At the trial of an ejectment, brought by the heir, it appeared that two of the attesting witnesses were trustees, and all three of the witnesses at the time of the attestation, and at the testator's death, were respectively seised of lands in Mauls Meburn, and were assessed to and paid the poor tax there, but that before the trial the witnesses who were named as trustees had released all their interest under the will to the other trustees, and that all the witnesses had conveyed away their said respective lands. On a special case reserved, the Court of Common Pleas held that the will was well attested. Pratt, C. J. (afterwards Lord Camden), dissented in an opinion which was printed in a separate pamphlet, and will be found reprinted at length in 1 Day, 41–88, *note*.

In *Brograve* v. *Winder*, 2 Ves. Jr. 634, 636 (1795), "An objection was made to the competency of one of the witnesses to the will, as interested at the time of his examination: but as he had no interest at the execution of the will and the death of the testator, the Lord Chancellor [Lord Loughborough] held him to be a good witness."

In the United States the generally received doctrine is that attesting witnesses must be competent at the time of the attestation. In Pennsylvania no subscribing witnesses are required; see *Kerns* v. *Swaman*, 16 S. & R. 315 (1827); and in Maryland, although it is held that a witness must be competent at the time of attestation, it is also held that a legatee is a competent attesting witness, and so if he releases his legacy he may testify at the trial. *Shaffer* v. *Corbett*, 3 H. & McH. 513 (1797). See *Jackson* v. *Woods*, 1 Johns. Cas. 163 (1799).

BETTISON *v.* BROMLEY.

King's Bench. 1810.

[*Reported* 12 *East*, 250.]

This was an issue directed by the Master of the Rolls, to try whether a paper writing dated 28th April, 1807, and purporting to be the will of the late Sir Geo. Pauncefote, Bart., was executed by Sir George in the manner required by law to pass real estate. The plaintiffs maintained the affirmative, and the defendant the negative: and at the trial before *Lord Ellenborough*, C. J., at Westminster, a verdict was found for the plaintiffs with nominal damages, subject to the opinion of the court on this case.

The testator was of sound mind; the will was attested by three witnesses, and the execution of it in every respect regular, supposing the witnesses were competent: but an objection was made to the competency of Susan Smith, one of the attesting witnesses, on the ground that she was the wife of Jeremiah Smith, whom the testator had named one of his executors in the will, and who, with the other executors, had proved the will and acted. Jeremiah Smith was not a creditor of the testator, either at the time of the execution of the will or of the testator's decease; and he had no interest but what (if any) appeared on the face of the will. A copy of the will accompanied the will; but Jeremiah Smith appeared to take no beneficial interest under it. The question reserved was whether Susan Smith were a competent witness to prove the execution of the will? If she were, the verdict was to stand; if not, a verdict was to be entered for the defendant.

Dampier, for the plaintiffs.

Littledale, contra.

Le Blanc, J., said that the only question here was whether this were a good will of land: and whatever the decision might be, it would not affect any question concerning the probate in the Commons.

And all the Court agreed upon the principal point, that the will was well proved in this case. Lord Ellenborough, C. J., said that the point had been decided so long ago as Lord Hale's time, that an executor, having no interest in the surplus, was a good witness to prove the will in a cause concerning the estate: and this had been followed by other decisions to the same effect. Here the executor took no interest under the will, but only a burdensome office. The other judges concurring.

Postea to the plaintiffs.

HATFIELD *v.* THORP.

KING'S BENCH. 1822.

[*Reported* 5 *B.* & *Ald.* 589.]

THE following case was sent by the Master of the Rolls for the opinion of this court.

John Steemson was, at the respective times of making his will and of his death, seised in fee simple of a freehold messuage, house, and garden, situate at Newark, in the county of Nottingham; and being so seised, made his last will in writing, bearing date the 18th of November, 1779, and thereby devised to his daughter, Mary Bell, "All that his messuage, house, and garden, at Newark aforesaid; and at his daughter Mary Bell's death, the messuage and appurtenances to his daughter Elizabeth Hatfield and her heirs, forever." The said John Steemson signed and published his will in the presence of Ann Hill, Samuel Leonard, and Thomas Hatfield, who respectively attested the same in his presence, and in the presence of each other. Thomas Hatfield, one of the attesting witnesses to the will, was, at the time of his attestation, the husband of the said Elizabeth Hatfield, the daughter of the testator. John Steemson died shortly after making his will, without having altered or revoked the same, leaving the said Mary Bell, Elizabeth Hatfield, and Thomas Hatfield, surviving him. Elizabeth Hatfield died on the 9th of April, 1813, in the lifetime of Mary Bell, without having done any act to dispose of the interest (if any) which she took under the will of John Steemson, leaving Thomas Hatfield, her husband, and the plaintiff, John Hatfield, her eldest son and heir-at-law, surviving her. Thomas Hatfield died in January, 1819, and Mary Bell on the 10th day of April, 1820. The question for the opinion of this court was, whether the will of John Steemson was duly attested to pass any, and what estate, in the messuage, garden, and premises at Newark, to Elizabeth Hatfield.

Cockerill, for the plaintiff.

Reader, contra.

The COURT afterwards sent the following certificate: —

This case has been argued before us; and we are of opinion, that the will of the said John Steemson was not duly executed, so as to pass any real estate in the messuage, garden, and premises to Elizabeth Hatfield. — C. ABBOTT, G. S. HOLROYD, W. D. BEST.

SEARS *v.* DILLINGHAM.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1815.

[*Reported* 12 *Mass.* 368.]

THIS was an appeal from a decree of the Judge of Probate of the County of Barnstable, approving and allowing the last will and testament of Thomas Snow, late of Harwich in said county deceased.

The reason assigned for the appeal, pursuant to the Statute, was that the said testator was not, at the time of executing the supposed will, of sound and disposing mind and memory. All the requisites of the law having been complied with on the part of the appellant, and the appeal having been entered October Term 1813, at Barnstable, an issue was directed by the court and joined by the parties, to try by jury the sanity of the testator: but the original will not being then produced in court, the cause was continued to the next term, October 1814, when it proceeded to trial.

The said Dillingham was a subscribing witness to the will, and with Thomas Snow, jun., appointed executor thereof.

Before the trial came on, doubts having been suggested of Dillingham's competency to testify on the trial, although he had no bequest or devise to him in the will; he moved for leave to surrender and resign his appointment and trust of executor to said will.

But it was determined by the court, that having accepted the trust, and given bonds faithfully to perform it, he could not afterwards be permitted to renounce.

At the trial, the said Dillingham was offered on the part of the executors and devisees, as a witness to prove the execution of the will and the sanity of the testator; but on motion of the appellant he was rejected as incompetent, on the ground of his being a party to the process liable to the payment of costs, if the decree of the judge of probate should be reversed.

Upon the testimony of the two other subscribing witnesses, and much other evidence, a verdict was returned upon the issue, that the said testator was of sound and disposing mind and memory at the time of executing the said will.

An objection was then taken by the counsel for the appellant, that the will was not authenticated pursuant to the Statute of 1783, *c.* 24, § 2, which requires the attestation of three credible witnesses.

The cause, being continued *nisi* for the consideration of this objection, was argued at this term by *Whitman* for the appellant, and *Thomas* for the respondents. In support of the objection it was said that Dillingham, not being a competent witness at the trial, could not be a *credible* witness to attest the will, the object of the Statute being to require such

subscribing witnesses, as could testify at the time of the probate of the will, and afterwards, if necessary, upon appeal to this court.

At the following September Term in Berkshire, the opinion of the court was delivered by

PARKER, C. J. The first question to be decided in this case is, whether Dillingham was rightly rejected as a witness at the trial. For if he ought then to have been admitted, it is obvious that the other objection would be superseded.

The court, which made that decision, was competent to make it definitively; but as there was no opportunity to consult books at the place where the trial was had, it is proper to re-examine the question, so far as may be necessary to settle the point now immediately before us. And we are satisfied that the decision was right in principle, as well as conformable to the practice in this State on the rules of evidence.

It seems that by the common law an executor, who is not residuary legatee, and has no beneficial interest in the estate, may be a witness, to prove the execution of the will and the sanity of the testator; being considered a mere trustee and nominal party, having no real interest in the contest. So likewise a guardian in socage, or a devisee in trust for other persons, may be a witness in support of the will. But it is held that a guardian of record cannot be a witness in favor of his ward: and the reason given is, that he is liable for the costs of the suit, if it should be determined against the ward.

By parity of reason, an executor in this State, who by Statute is liable to costs upon an appeal, is not competent to testify upon a trial: for he is not merely a nominal party, but is directly and personally interested in the event of the suit. The interest may be slight; but it may also be important, as the costs in the case of a will, contested on the ground of the insanity of the testator, are usually not inconsiderable. But this rule has been invariably adhered to in the courts of this State, there being no instance of an executor, administrator, or guardian being admitted to testify, to support actions in favor of the estates they represent: their being parties, and liable eventually to costs, having been always deemed a sufficient objection.

The decision of the court, therefore, against the admission of Dillingham as a witness, was right: and this opens the question intended to be saved for consideration, — whether, as one of the subscribing witnesses was incompetent at the time of the trial, the will was attested by three credible witnesses, pursuant to our Statute, which prescribes the manner of devising lands, tenements and hereditaments.

The construction given to the term *credible*, as used in the Statute, by this court in the case of *Amory* v. *Fellowes*, 5 Mass. Rep. 229, is somewhat different from that which was adopted by Lord Mansfield in the celebrated case of *Windham* v. *Chetwynd*, 1 Bur. 414, in discussing the effect of the same word in the English Statute of Frauds and Perjuries. The meaning of the Statute, according to our decision, is that the will shall be attested by three witnesses who are competent to

testify; and this competency must exist at the time of the subscription, and not be acquired by act *ex post facto;* as was settled in England in the case of *Anstey* v. *Dowsing*, 2 Str. 1253.

It must necessarily follow from the rule, that a subsequent incompetency will not affect the formal execution of the will. Otherwise the commission of a crime, which renders infamous, — or the succession to an estate under a devise, would disable a witness, who was free from any taint of crime or interest at the time of subscribing: a doctrine, which would greatly embarrass the practice of disposing of estates by will, and produce constant uncertainty in the minds of testators, whether their property would be appropriated according to their wishes.

Incompetency to give testimony arises only (except that in some instances a witness is excluded on the ground of policy) from interest and infamy; both of which may arise long after the execution of a will, and frequently without the knowledge or after the death of the testator. In such cases, proof of the handwriting of the witnesses, who were competent at the time of the attestation, and who cannot be sworn at the trial, or of their actual signing in the presence of the testator, by some witness who remains competent, must be resorted to; or many wills, against which no objection would lie at the time of their execution, would be defeated.

Cases may arise when none of the attesting witnesses can be examined: as if they should all be dead, or should become infamous after the attestation, or should have gone into foreign parts beyond the authority of the State, or the power of the persons interested to obtain depositions. In such cases, there seems to be no reason why the rules of law, which admit of evidence of an inferior character in relation to deeds and other instruments, should not be applicable to a will as to a deed or bond; provided the formalities required by the Statute appear to have been observed.

If then Dillingham was a competent witness at the time he attested the will, there can be now no legal objection to it because of his subsequent incompetency. He appears to derive no interest whatever under the will, not being residuary legatee, or having any devise or bequest in it. He is merely named executor, with another person who is residuary legatee. He could not, even by accepting the trust, acquire any interest: although he might subject himself to some liability, which would render him incompetent afterwards to testify. But this at the time was contingent, and depending altogether upon his assent. Had he died before the testator, the will might have been proved and committed to the other executor to administer alone; or had he renounced the trust, the same disposition would have been made. No person could have been more free from interest, than he was at the time of attestation. He might not have known at the time of signing, that he was named executor in the will. For the witness need not know the contents of the will which he attests: and even the testator might not have known that the person he had named as executor, was called

as a witness; it not being necessary that he should see the witness face to face.

It was argued, however, that no will can be proved, unless all the subscribing witnesses, who are alive and within the control of the court, are produced to testify. This, as a general rule, is undoubtedly well settled both here and in England. But there are obvious exceptions, as necessary to be regarded as the rule itself. The case of witnesses having become infamous instantly occurs, as one of the exceptions. They may be alive, and within the control of the court, and yet their testimony cannot be had, and the will may be proved without it. The same reason is applicable to witnesses, who have become interested without the consent of those who claim under the will.

If it be said that such persons may be produced, and the heir may waive his objections to them, and avail himself of their testimony; the same may be said of an executor: and indeed an example is furnished in the present case. It was only at the instance of the heir that Dillingham was rejected, he being in court at the trial and offered as a witness.

We are all of opinion that this will was duly executed according to the Statute: and as the verdict has disaffirmed the reason of appeal, the decree of the judge of probate must be affirmed, with costs for the respondents.

WINSLOW *v.* KIMBALL.

SUPREME JUDICIAL COURT OF MAINE. 1846.

[*Reported* 25 *Me.* 493.]

ON November 21, 1844, Andrew G. Winslow made his last will and testament, wherein he directed, that the principal portion of his estate should be divided into three equal parts, and that his brother, John Winslow, who now contests the validity of the will, should have one part, and that his friends, Jeremiah Kimball and Edward Wheeler, Jr., who were made executors, should also each have a third. The testator died in December, 1844, and in Feb., 1845, the will was approved and allowed by the judge of probate. John Winslow appealed from that decree. One of the three subscribing witnesses to the will was, at the time, the wife of Edward Wheeler, Jr., one of the legatees. Upon the death of the testator, Wheeler declined to act as executor, and released all his claim under the will to Kimball.

Codman and *Fox*, for John Winslow.

W. P. Fessenden, for the defendant.

WHITMAN, C. J. This is an appeal from the decree of the judge of probate, for this county, approving the will of A. G. Winslow, deceased. The instrument was subscribed as usual by three attesting witnesses. But one of them was the wife of a legatee in the will. And it is

insisted, that this is not a case within the Rev. Stat. *c.* 92, § 5, rendering bequests to subscribing witnesses void, as the wife was not a legatee; and it must be admitted, that, nominally, she was not; and upon a construction strictly literal, the ground relied upon might be tenable. But Statutes are to receive such a construction as must evidently have been intended by the Legislature. To ascertain this we may look to the object in view; to the remedy intended to be afforded; and to the mischief intended to be remedied. The object in view in the provision in question clearly was to prevent wills from becoming nullities, by reason of any interest in witnesses to them, created entirely by the wills themselves. No one can doubt, if it had occurred to the Legislature, that the case before us was not embraced in the enactment, that it would have been expressly included. It was a mischief of the precise kind of that which was provided against; and we think may be regarded as virtually within its category.

Accordingly, in New York, where the statutory provision, in this particular, is the same as in this State, a devise or legacy to the husband or wife, the other being a witness to the will bequeathing it, is held to be void, upon the ground, as expressed by one of the judges of the court there: "that the unity of husband and wife, in legal contemplation, is such, that, if either be a witness to a will, containing a devise or legacy to the other, such devise or legacy is void, within the intent of the Statute;" and upon the ground, that the Statute concerning wills should receive a liberal construction, and one consistent with common-sense. *Jackson* v. *Wood*, 1 Johns. Cas. 163; *Jackson* v. *Durland*, 2 Ib. 314.

The decree of the judge of probate affirmed.[1]

RICHARDSON *v.* RICHARDSON.

SUPREME COURT OF VERMONT. 1862.

[*Reported* 35 *Vt.* 238.]

APPEAL from the decision of the Probate Court for the District of Westminster, admitting to probate the last will of Warren B. Richardson, deceased.[2]

The cause was tried by jury at the September Term, 1860, *Redfield*, C. J., presiding.

It appeared on trial that the instrument propounded was executed by the testator at Springfield, Vermont, on the 17th of September, 1857, in the presence of Henry Closson, Emily W. Closson, and Barna A. Cook, who subscribed their names thereunto as witnesses. The appellees having proved the execution of the will by the above-named

[1] See *Hawkins* v. *Hawkins*, 54 Iowa, 443 (1880).

[2] Part of the case, relating to another point, is omitted.

witnesses, proposed to read the same to the jury, but it appearing that Barna A. Cook, one of the subscribing witnesses, was also one of the executors named in the will, the appellants objected, but the court overruled the objection, and permitted the will to be read, to which the appellants excepted. The verdict affirmed the decree of the Probate Court.

P. T. Washburn, for the appellant.

H. E. Stoughton, for the executors.

POLAND, C. J. The question, whether an executor, who takes no benefit under a will, is a good witness to its execution, seems very well settled by authority.

It was so decided in *Sears* v. *Dillingham*, 12 Mass. 358, where the precise point was before the court, and under a Statute identical with our own. It is said by C. J. Parker in that case, that such is the English rule. And it seems to have been settled so in the case of *Phipps et al.* v. *Pitcher*, 6 Taunt. 220, which was a case sent to the Court of Common Pleas from the Court of Chancery for their opinion on the point. The point is decided in the same way in Connecticut: *Comstock* v. *Hodlyson*, 8 Conn. 254. Also in New Jersey: *Dew* v. *Allen*, 1 Pennington, 35. Also in Virginia: *Coalter* v. *Bryan*, 1 Gratton, 18. Also in Pennsylvania: *Vansant* v. *Boileau*, 1 Binn. 444. The only case cited by the plaintiff as supporting the contrary is that of *Barrett* v. *Silliman*, 16 Barb. N. Y. Sup. Ct. 198, a case decided by the Supreme Court of the Third Judicial District in New York. Harris, J., who gave the opinion in that case, states that by the common law the executor is not a competent witness to a will, but he cites no English case or author to sustain him. He quotes a case from South Carolina, *Taylor* v. *Taylor*, 1 Rich. 531, and two cases from North Carolina, *Tucker* v. *Tucker*, 5 Iredell, 161, and *Allison's Executors* v. *Allison*, 4 Hawks, 141, to show that in those States, an executor is held not to be a competent witness to a will. But in a note by Judge Perkins to Jarman on Wills, 1 vol. page 66, these cases are cited, and it is stated that they decide that the executor is a good witness to a will disposing of real estate, but not to a will of personalty, because the Statutes of those States give an executor commissions upon the personalty, placing the executor much upon the same ground as a legatee under the will. With this explanation of these cases, they afford very little authority for the plaintiff's position under our Statute.[1]

It is held by Judge Harris in the same case, that the executor may

[1] "The only question presented is, whether the person, named as executor, is competent as one of the *attesting* witnesses to a will of personalty. It is settled, that the witness must be disinterested at the time of the attestation, and it is decided in *Allison* v. *Allison*, 4 Hawks, 141, cited and approved in *Tucker* v. *Tucker*, 6 Ired. 161, that a right to commissions is such an interest as disqualifies a witness. An executor has a right, by law, to commissions upon the receipts and disbursements of the assets. The fact, that the witness renounced, and executed a release, does not remove the disqualification, which existed at the time of the attestation." — *Per* PEARSON, J., in *Morton* v. *Ingram*, 11 Ired. 368 (1850).

be rendered a competent witness, by his renunciation of his executorship. It is not very apparent how this could be, if he was not a *credible* or *competent* witness at the time, by reason of his then having an interest under the will by being named as an executor therein, for all the authorities now agree, that the validity of the will in this respect, depends upon the competency of the witness at the time, and not when the will is propounded, and this seems to stand on the soundest foundation in reason.

The executor was offered as a witness to establish the execution of the will, and rejected, although he offered to renounce his executorship, because he was also a trustee under the will of the bulk of the estate, and therefore interested to have the will sustained.

The decision excluding the executor as a witness at the trial, was proper enough for aught we can see. In *Sears* v. *Dillingham*, 12 Mass. 368, the executor was rejected as a witness on the trial, as the court held, that being a party to the record he might be liable for costs, but that his interest arose from the liability he had taken upon himself, and not from any benefit he derived under the will.

Notwithstanding what is stated by Judge Harris, as to the executor not being a competent witness to the will, and after he was rejected as a witness at the trial, no question seems to have been made that the will was invalid by reason of not having been attested by a sufficient number of competent witnesses, and the court proceeded to dispose of the case upon other questions, and the will was finally held invalid on two grounds: want of sufficient capacity in the testatrix, and because it was not declared by her to be her will in the presence of the witnesses, as the New York Statute requires.

The questions decided appear to have been properly disposed of, but it appears they were not all treated in the most logical way by Judge Harris in his opinion.

If the question were new, we see no good reason why the executor is not a *credible* or *competent* witness to a will, under which he takes no interest, but is named as executor. It is at the time altogether contingent and uncertain whether he will ever be called upon to perform the duty of executor. He may die before the testator. The testator may revoke the will, or make a new one, and appoint another executor. But if it be regarded as settled at the time, that he is to be executor, the only interest he can be said to acquire is to perform a service, for which he is to receive a bare compensation, just in proportion to the service performed. This can hardly be regarded as a legal interest, by any rule that has ever been recognized in the law.

If a fixed per cent were given by law, irrespective of the actual services performed, it would be quite a different case.

The judgment is affirmed, with costs in this court, and ordered to be certified to the Probate Court.[1]

[1] See *accord.*, *Rucker* v. *Lambdin*, 12 Sm. & M. 230 (1849); *Stewart* v. *Harriman*, 56 N. H. 25 (1875), and cases there cited. In *Noble* v. *Burnett*, 1 Rich. 505 (1857), it

SULLIVAN *v.* SULLIVAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1871.

[*Reported* 106 *Mass.* 474.]

GRAY, J. This is an appeal from a decree of *Mr. Justice Wells*, by which a decree of the Probate Court, allowing as the will of Margaret Sullivan an instrument which contained a devise to Thomas Sullivan, and to which his wife was one of the three attesting witnesses, was reversed; and the only question is, whether upon these facts she was a competent attesting witness to the will.

By the law of this Commonwealth, a will must be attested by three competent witnesses, that is to say, witnesses who at the time of the attestation would be competent by the rules of the common law to testify concerning the subject-matter. *Hawes* v. *Humphrey*, 9 Pick. 350; Rev. Sts. *c.* 62, § 6, and commissioners' note; Gen. Sts. *c.* 92, § 6; *Sparhawk* v. *Sparhawk*, 10 Allen, 155, 156. And "all beneficial devises, legacies and gifts, made or given in any will to a subscribing witness thereto, shall be wholly void, unless there are three other competent witnesses to the same." Gen. Sts. *c.* 92, § 10.

It is admitted that a wife cannot be deemed a competent witness to a will containing a valid devise to her husband. But it is contended that, within the reason and effect of the section last quoted, a devise to her husband is a beneficial devise to her, and is therefore void, leaving her a competent attesting witness to the will, and the will itself valid in all other respects. And this position, though doubted by a majority of the Supreme Court of Connecticut in *Fortune* v. *Buck*, 23 Conn. 1, is supported by earlier decisions in New York and Maine. *Jackson* v. *Woods*, 1 Johns. Cas. 163; *Jackson* v. *Durland*, 2 Johns. Cas. 314; *Winslow* v. *Kimball*, 25 Maine, 493.

But with great respect for the learning and ability of the courts which made those decisions, and after carefully weighing the arguments in support of the construction contended for, we are unanimously of opinion that it is founded rather upon a conjecture of the unexpressed intent of the Legislature, or a consideration of what they might wisely have enacted, than upon a sound judicial exposition of the Statute by which their intent has been manifested. The only devises which the Statute declares to be void are beneficial devises to a subscribing witness. It does not avoid even a devise to a subscribing witness, which gives him no beneficial interest, as, for instance, a devise to an executor, for the exclusive benefit of other persons. *Wyman* v. *Symmes*,

was held that one named executor was a good witness to a will, but that he came within the St. 25 Geo. II. *c.* 6, and lost his commissions; whether he lost his office also, *quære.*

10 Allen, 153; 1 Jarman on Wills, 65. It does not avoid any devise to and for the benefit of any person other than a subscribing witness, even if a subscribing witness would incidentally take some benefit from the devise. In order to maintain the position contended for, it would be necessary to declare void, not merely the interest which the wife, who was a subscribing witness, would take, by way of dower or otherwise, in the property devised to her husband, but also the whole devise to and for the benefit of the husband himself, who was not a subscribing witness, and whose estate the Statute does not assume to reach.

Our conclusion is fortified by a consideration of the history of the legislation upon this subject in England and in this Commonwealth.

The English Statute of Frauds required wills devising lands to be attested and subscribed in the presence of the devisor by three or four credible witnesses. St. 29 Car. II. *c.* 3, § 5. And that provision was re-enacted here in the first year of the Province. Prov. St. 4 W. & M. (1692–3), *c.* 15, § 3; 1 Mass. Prov. Laws (State ed.), 46; Anc. Chart. 235.

In *Holdfast* v. *Dowsing*, 2 Stra. 1253, where a testator charged all his estate, real and personal, with legacies to one of the subscribing witnesses and to his wife, and with an annuity to the wife, the Court of King's Bench held that the Statute of Frauds certainly meant that the "credible witnesses" should not be such as claimed a benefit by the will; and that, even if the tender to the husband, at the trial, of the amount of the two legacies, would remove the objection on that ground (which the court thought it would not), yet the charge upon the real estate of the annuity to the wife made the husband an incompetent witness. Although the doctrine as to the legacies has been since controverted in England, upon the ground that the competency of the witnesses was to be determined at the time of the proof, and not at that of the execution of the will, the incompetency of either husband or wife to be a witness to a devise to the other, which the witness could not release, has never been doubted. *Windham* v. *Chetwynd*, 1 Burr. 414, 424; s. c. 1 W. Bl. 95, 100; Bul. N. P. 265. The case of *Holdfast* v. *Dowsing* was taken by writ of error to the Exchequer Chamber, and after argument and before judgment there was compromised by the parties; and gave occasion to the St. of 25 Geo. II. *c.* 6. 1 W. Bl. 8; 1 Ves. Sen. 503; 2 Bl. Com. 377. The reason of this, as stated by Sir William Blackstone in his Commentaries, was, that the determination in the King's Bench "alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom that depended upon devises by will;" because it "would not allow any legatee, nor by consequence a creditor, where the legacies were charged on the real estate, to be a competent witness to the devise."

The St. of 25 Geo. II. *c.* 6, accordingly provided, in § 3, that to the execution of wills already made any attesting witness to whom any legacy was given, whether charged upon lands or not, might be admitted as a witness, upon payment, release or tender of his legacy;

and, by §§ 1, 2, that in future wills any attesting witness "to whom any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate" (except charges on lands for payment of debts) "shall be thereby given or made," should be admitted as a witness to the will, within the intent of the Statute of Frauds, and "such devise, legacy, estate, interest, gift or appointment shall, so far only as concerned such person attesting the execution of such will, or any person claiming under him, be utterly null and void;" and that charges of debts upon lands should not make any creditor an incompetent witness. All these provisions were re-enacted in our St. of 1783, *c.* 24, §§ 11–13; and the provision of St. 25 Geo. II. *c.* 6, § 3, and St. 1783, *c.* 24, § 13, for removing the interest of a witness by payment, release or tender, was omitted in the revision of our Statutes in 1836. But neither the St. of 25 Geo. II., nor the St. of 1783, contained any provision as to devises to the wife or husband of an attesting witness, notwithstanding the general attention which had been called to the subject by the case of *Holdfast* v. *Dowsing*.

In 1822, a case was brought before the Court of King's Bench, in which a testator devised, upon the determination of an estate for life, an estate in fee to the wife of one of the attesting witnesses, and the wife died before the determination of the life estate. It was argued, that, if before the St. of Geo. II. the husband would have been an incompetent witness, the clear intent of that Statute was to restore the competency of the attesting witness in all cases of benefit arising to him under the will, and to avoid the will "so far only" as concerned the person attesting the execution, or any person claiming under him; and since that Statute, therefore, no will could be void by reason of interest arising under it to any attesting witness, further than regarded the interest of such witness or any person claiming under him; and consequently the will was duly attested. To which it was answered that the St. of Geo. II. applied only to cases where the interest taken under the will was destroyed by the Statute itself; that the husband took no estate or interest under the will; that his wife indeed took an estate under the will, and by operation of law he in right of his wife derived a beneficial interest from that estate, which they might have sold during her life, and which would have given him an estate by the curtesy if she had survived the life tenant; but that the estate of the wife was not destroyed by the Statute, and consequently the derivative beneficial interest, which the husband took in right of his wife only, was not extinguished; and that, independently of the question of interest, it was a general rule that a husband or wife could not in any case be a witness for the other, as was held in *Davis* v. *Dunwoody*, 4 T. R. 678. And the court was of opinion that the will was not duly attested. *Hatfield* v. *Thorp*, 5 B. & Ald. 589. The point thus adjudged upon the application of the St. of Geo. II. is summed up by Mr. Jarman as follows: "That it applied only when the witness took a direct interest under the will, and not when it arose

consequentially. Thus in *Hatfield* v. *Thorp*, where one of the three attesting witnesses to a will was a husband of a devisee in fee of a freehold estate, and would *jure uxoris* have derived an interest in the lands, it was held that the devise was not within the Statute, and consequently that the attestation was insufficient." And such continued to be the law of England until 1837, when the St. of 1 Vict. *c.* 26, extended the disqualification to take beneficially under the will to the husband or wife of the attesting witness. 1 Jarman on Wills, 65–67. In neither of the revisions of our own Statutes in 1836 and 1860, is any express provision introduced upon this point. Rev. Sts. *c.* 62, § 6; Gen. Sts. *c.* 92, § 6. And the Statutes removing the objections to the competency of witnesses on the grounds of interest and of the relation of husband and wife are expressly declared not to apply to attesting witnesses to a will or codicil. Gen. Sts. *c.* 131, § 15; St. 1870, *c.* 393, § 2.

The result is, that the decree reversing the decree of the Probate Court is to be affirmed, and the

Will not admitted to probate.

N. C. Berry, for the appellee.

L. M. Child, for the appellant.[1]

PEASE *v.* ALLIS.

SUPREME JUDICIAL COURT. 1872.

[*Reported* 110 *Mass.* 157.]

APPEAL by the person named as executor in an instrument purporting to be the will of William S. Allis, from a decree of the Probate Court, disallowing the instrument as the will of William S. Allis. At the hearing, before *Ames*, J., it appeared that one of the three witnesses to the instrument was the wife of William S. Allis. The judge reported the case for the determination of the full court "upon the question of law involved: if the wife was a competent witness, the will to be admitted to probate; otherwise, the appeal to be dismissed, and the decree of the Probate Court affirmed."

G. Wells (*N. A. Leonard* with him), for the appellant.

M. P. Knowlton (*G. M. Stearns* with him), for the appellee.

CHAPMAN, C. J. By the Gen. Sts. *c.* 92, § 6, a will must be subscribed by three or more competent witnesses. They must be competent at the time of the attestation of the will. By the common law, it was a settled principle that husbands and wives could not in any case be admitted as witnesses for or against each other, independently of the question of interest. None of our Statutes have changed the rule in this respect as to the attestation of wills, and the rule applies to such

[1] See *accord.*, *Giddings* v. *Turgeon*, 58 Vt. 106 (1886).

attestation. *Davis* v. *Dimwoody*, 4 T. R. 678; *Hatfield* v. *Thorp*, 5 B. & Ald. 589; *Sullivan* v. *Sullivan*, 106 Mass. 474.

As the wife of the testator in this case was not a competent witness when the will was executed, his death did not make her competent.

Decree affirmed.

NOTE. — A will is not rendered invalid by being attested by one who may possibly be benefited by a charitable bequest therein, if his taxes will not be diminished. *Cornwell* v. *Isham*, 1 Day, 35 (1802); *Hawes* v. *Humphrey*, 9 Pick. 350 (1830); *Warren* v. *Baxter*, 48 Me. 193 (1859); *Quinn* v. *Shields*, 62 Iowa, 129 (1883).

Cf. *Patten* v. *Tallman*, 27 Me. 17 (1847).

Under the Statute of Frauds and the St. 25 Geo. II. *c.* 6, a witness to a will of personalty did not lose a legacy. *Emanuel* v. *Constable*, 3 Russ. 436 (1827).

Under the Wills Act a bequest to a trustee is not invalidated by his being a witness. *Cresswell* v. *Cresswell*, L. R. 6 Eq. 69 (1868).

A legacy in a will is not lost by the legatee's attesting a codicil which confirms the will, not even if he be a residuary legatee, and the codicil revoke legacies, thereby increasing the residue. *Gurney* v. *Gurney*, 3 Drew. 208 (1855). Nor under the Wills Acts does a devisee lose his devise by marrying an attesting witness after the attestation. *Thorpe* v. *Bestwick*, 6 Q. B. D. 311 (1881).

Both under the St. 25 Geo. II. *c.* 6 and the Wills Act, one who signs a will as a witness will lose a devise to him, although there be enough competent witnesses without him. *Doe* d. *Taylor* v. *Mills*, 1 Mood. & R. 288 (1833); *Wigan* v. *Rowland*, 11 Hare, 157 (1853). But cf. *Randfield* v. *Randfield*, 8 H. L. C. 225, 232 (1860); *Goods of Sharman*, L. R. 1 P. & D. 661 (1869). In many of the United States this is otherwise by Statute. See 1 Woerner, Amer. Law of Adm. § 41.

G. *Attestation.*

SHIRES *v.* GLASCOCK.

COMMON PLEAS. 1687.

[*Reported* 2 *Salk.* 688.]

UPON a feigned issue, the question was, Whether the will was made according to the Statute of Frauds? For the testator had desired the witnesses to go into another room, seven yards distant, to attest it, in which there was a window broken, through which the testator might see them. ET PER CUR. The Statute required attesting in his presence, to prevent obtruding another will in place of the true one. It is enough if the testator might see, it is not necessary that he should actually see them signing; for at that rate if a man should but turn his back, or look off, it would vitiate the will. Here the signing was in the view of the testator; he might have seen it, and that is enough. So if the testator being sick should be in bed and the curtain drawn.

DAVY *v.* SMITH.

KING'S BENCH. 1693.

[*Reported* 3 *Salk.* 395.]

UPON a trial at bar, the question was, Whether the *witnesses* to a will had pursued the directions of the Statute of Frauds. &c., in *subscribing* their names? and it was resolved, that where the testator lay in a bed in one room, and the witnesses went through a small passage into another room, and there set their names at a table in the middle of the room, and opposite to the door, and both that, and the door of the room where the testator lay, were open, so that he might see them subscribe their names if he would, and though there was no positive proof that he did see them subscribe, yet that was a sufficient subscribing within the meaning of the Statute, because it was possible that the testator might see them subscribe; and therefore, PER CURIAM, if the witnesses subscribe their names in the same room where the testator lies, though the curtains of the bed are drawn close, it is a good subscribing within this Statute; because, if it is in his power to see them, and what is done, it shall be construed to be in his presence.

ELLIS *v.* SMITH.

CHANCERY. 1754.

[*Reported* 1 *Ves. Jr.* 11.]

PARKER, C. B.[1] The questions in this case arise on the fifth and sixth sections in the Statute of Frauds. The first is, Whether testator's declaration before three witnesses, that it is his will, is equivalent to signing it before them; and constitutes a good will within the fifth section; and, 2dly. Whether such will is a revocation according to the sixth.

The formalities requisite to a will are, 1st. That it be in writing. 2dly. That it be signed by the party devising, or some other in his presence and by his direction. 3dly. That it be attested and subscribed in his presence by three or more witnesses.

I confess, if this had been *res integra*, I should doubt, whether the testator's declaration is a proper execution within the fifth clause; because, I think, an admission that it is sufficient tends to weaken the

[1] This case was heard before LORD HARDWICKE, C., assisted by SIR JOHN STRANGE, M. R., SIR JOHN WILLES, Lord Chief Justice of the Common Pleas, and SIR THOMAS PARKER, Lord Chief Baron of the Exchequer. Only the opinion of the last is given; all the others were to the same effect.

force of the Statute; and let in inconveniencies and perjuries, which the Statute designed to prevent; but I find myself bound by such a number of former precedents, that I must give way to their superior weight. The case of *Lemayne* v. *Stanley*, 3 Lev. 1, must, I think, have come before the court on this very question now before us; for I can see no other; it being allowed in that case on all hands that signing in any part of the will was sufficient. In Skinn. 227, Lord Jefferies declared, he thought the testator's acknowledgment sufficient. Com. 197. Lord Trevor of the same opinion: and in *Dormer* v. *Thurland*, 2 P. Will. 510, Lord King inclined to think a will of land good, if the testator acknowledged the name to be his, and the witnesses subscribed in his presence. The case of *Lee* v. *Libb*, Carth. 35, has been insisted on; and brought to bear down the authorities I have now mentioned. But what was that case? There was only one witness to the will, and two to the codicil; neither therefore had three witnesses; *ergo*, not good. Indeed Lord Holt there said, he thought, the witnesses should attest the signing; but that was an *obiter dictum*. To strengthen the authorities I have already mentioned, I shall take notice of the cases, which allow the witnesses to subscribe at different times; and I think, they support the admission of the declaration in question; since the testator is not supposed to run over his name before every witness; but having signed before one, to acknowledge it only before the rest.

In *Cook* v. *Parsons*, Prec. Ch. 184, the Lord Keeper held a publication of a will before three witnesses, though at three several times, good within the Statute; and in *Jones* v. *Lake*, the court decreed, that the witnesses may subscribe at different times. As to the point, whether sealing be signing, as has been contended; I own, I think, it is not; for the character and handwriting are necessary; and were designed to prevent or detect frauds and impositions. But however as in some cases it is thrown out *obiter*, and in one case decreed, that it is equal to signing, I shall submit my opinion.

As to the second question, Whether such will is a revocation within the sixth section of the Statute, I think it is; and that a revocation may be by any will executed according to the fifth section; for the words, "*signed in the presence of three witnesses*," &c., relate only to the preceding words, "*any other writing*." The clause is to be construed in the disjunctive; viz. either by will, codicil, &c., or, by writing signed before three witnesses. In 3 Lev. 86, held no revocation, because neither will nor codicil; but had it been either, it would have been otherwise: Upon the whole therefore, I think, this is a good will, and a good revocation.

CASSON *v.* DADE.

CHANCERY. 1781.

[*Reported* 1 *Bro. C. C.* 99.]

HONORA JENKINS having a power, though covert, to make a writing in the nature of a will, ordered the will to be prepared, and went to her attorney's office to execute it. Being asthmatical, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her: after having seen the execution, they returned into the office to attest it, and the carriage was accidentally put back to the window of the office, through which, it was sworn by a person in the carriage, the testatrix might see what passed; immediately after the attestation, the witnesses took the will to her, and one of them delivered it to her, telling her they had attested it; upon which she folded it up and put it into her pocket. The LORD CHANCELLOR [LORD THURLOW] inclined very strongly to think the will well executed, and the case of *Shires* v. *Glascock*, 2 Salk. 688 (1 Lord Raym. 507), 1 Eq. Abr. 403, was relied upon to that purpose. *Mr. Arden* pressed much for an issue; but, finding LORD CHANCELLOR's opinion very decisive against him, declined it.

WHITE *v.* TRUSTEES OF BRITISH MUSEUM.

COMMON PLEAS. 1829.

[*Reported* 6 *Bing.* 310.]

THIS was a feigned issue upon the question, whether William White, deceased, did, by a certain paper-writing, purporting to be his last will and testament, demise his freehold estates or not. And, upon the trial, the jury found a special verdict, setting out the paper-writing in question, and finding that the whole of the same, except the names of the witnesses, was in the handwriting of the said W. White: that the said W. White signed the said paper-writing before it was signed by the witnesses John Hounslow, Mary Bristow, and Thomas Badcock, or either of them: that he died on the 13th May, 1823; that about five months before his death, he requested the said John Hounslow and Mary Bristow to sign their names to the said paper-writing, and they respectively, in pursuance of such request, did sign the same in the presence of the said W. White, but that they did not see the signature of the said W. White to the said paper-writing, and were not informed by the said W. White, when they so signed the said paper-writing, or at any other time, what was the nature thereof, or the

purpose for which he requested them to sign the same: that, about three months before the death of the said W. White, he requested the said Thomas Badcock to sign his name to the said paper-writing, which he immediately did in the presence of the said W. White: that at the time of signing the said paper-writing by the said Thomas Badcock, the said W. White informed him that the said paper-writing was his will. The special verdict then went on to state, that the paper-writing consisted of two sheets of paper produced to the jurors; that the two sheets were in the same room at the times of the respective signatures of the three persons above mentioned; and that William White was of sound and disposing mind and memory at the time he signed the paper, and also at the time the three other persons signed their names as aforesaid.

It appeared from the inspection of the instrument set out in the special verdict, that the signature of the three names could not possibly inure to charge themselves, or any other person, and could not have been done for any other purpose whatever than simply to make them witnesses to the will. And it apppeared that, immediately above the names of the witnesses, there was written in the hand of the testator these words, "In the presence of us as witnesses thereto."

The case, after having been argued once, was sent down again for a more precise finding of the facts; and the foregoing special verdict having been found, was argued again in Trinity Term last.

Wilde, Serjt., for the defendants.

Adams, Serjt., *contra*.

Cur. adv. vult.

The judgment of the court was now delivered by

TINDAL, C. J. (After stating the facts as *ante*), Upon this special verdict, the question is, Whether in the execution of this will, the several requisites contained in the Statute of Frauds have been duly observed? By the 29 Car. 2, *c.* 3, § 5, it is enacted, "that all devises and bequests of any lands or tenements shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of non-effect." And as the special verdict finds that the whole of the paper-writing is in the handwriting of W. White, and that he signed it before it was signed by the witnesses, the jurors do find in terms, that there is a devise in writing, and that it is signed by the party who makes the devise.

Again, it is found expressly that the names of the three persons were signed by them upon the paper-writing in the presence of the said W. White; that is, in the language of the Statute, the writing was subscribed in the presence of the devisor. So that the inquiry is simplified and reduced to this single question, Whether the devise was attested by them within the meaning of the Statute?

It has been held in so many cases that it must now be taken to be settled law, that it is unnecessary for the testator actually to sign the will in the presence of the three witnesses who subscribe the same; but that any acknowledgment before the witnesses that it is his signature, or any declaration before them that it is his will, is equivalent to an actual signature in their presence, and makes the attestation and subscription of the witnesses complete. The case of *Ellis* v. *Smith*, which was decided by Lord Chancellor Hardwicke, assisted by the Master of the Rolls, Sir J. Strange, Lord Chief Justice Willis, and Lord Chief Baron Parker, all persons of high and eminent authority, is express to the latter point.

The objection, therefore, to the execution of the present will, does not rest upon the fact that it was not signed by W. White in their presence; but that with respect to two of the witnesses, Hounslow and Bristow, there was no acknowledgment of his signature, nor any declaration that it was his will; but that they signed their names in entire ignorance of the nature of the instrument, or of the object for which their names were written. And it is argued, that if such subscription of their names satisfies the intention of the Statute the word attested will have no force whatever, and may be considered as if it had never been inserted.

The question, however, appears to us to be, Whether, upon this special verdict, the finding of the jury establishes, although not an acknowledgment in *words*, yet an acknowledgment in *fact*, by the devisor to the subscribing witnesses, that this instrument was his will? for if by what the devisor has done, he must, in common understanding and reasonable construction, be taken to have acknowledged the instrument to be his will, we think the attestation of the will must be considered as complete, and that this case falls within the principle and authority of that of *Ellis* v. *Smith*.

In the execution of wills, as well as that of deeds, the maxim will hold good, *Non quod dictum sed quod factum est, inspicitur*.

Now, in the first place, there is no doubt upon the identity of the instrument. The paper in question, is the very paper-writing which was produced by the testator to the three witnesses. The great object of the direction of the Statute, that witnesses shall subscribe in the presence of the devisor, was to prevent the possibility of the witnesses returning to his hands any other instrument than the very instrument which he delivered to them to attest. This object has been attained in the present case, and the identity of the instrument is beyond dispute.

In the next place, it appears from the special verdict, that the devisor was conscious himself that this instrument was his will. For the verdict finds that he was of sound and disposing mind, both at the time he signed it himself, and also at the time when the witnesses subscribed their names.

But further it appears from the inspection of the instrument set out in the special verdict, that the signature of the three names could not

possibly inure to charge themselves, or any other person, and could not have been done for any other purpose whatever than simply to make them witnesses to the will. And, lastly, it appears from the same inspection, that immediately above the names of the witnesses, there was written in the handwriting of the testator these words, "In the presence of us as witnesses thereto," which do amount to a clear and unequivocal indication of the testator's intention that they should be witnesses to his will.

When, therefore, we find the testator knew this instrument to be his will; that he produced it to the three persons and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him; we think the testator did acknowledge in fact, though not in words, to the three witnesses, that the will was his. For whatever might have been the doubt upon the true construction of the Statute, if the case were *res integra*, yet as the law is now fully settled, that the testator need not sign his name in the presence of the witnesses, but that a bare acknowledgment of his handwriting is a sufficient signature to make their attestation and subscription good within the Statute, though such acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument, or the object of the signing; we think the facts of the present case place the testator and the witnesses in the same situation as they stood where such oral acknowledgment of signature has been made, and we do therefore, upon the principle of those decisions, hold the execution of the will in question to be good within the Statute.

Judgment for defendants.[1]

NEWTON *v.* CLARKE.

PREROGATIVE COURT OF CANTERBURY. 1839.

[*Reported* 2 *Curt.* 320.]

THIS was a question as to the admission of an allegation, propounding a paper as a codicil to the will of Mr. Patrick Persse, who died in June, 1839. The question was, whether the codicil was duly executed under the Statute 1 Vict. c. 26. It was alleged, that on the 8th of April, 1839, the deceased, being then confined to his bed, directed his nephew, who was the residuary legatee in the will, to prepare a codicil, increasing the legacy of a servant from £60 to £100, which he prepared accordingly, and brought to the deceased in his bedroom, which was small, the bed standing with the foot towards the fire-place. During the execution of the codicil by the deceased, the curtains of the bed were drawn open on both sides, but closed at the foot of the bed. Two small tables were in the room, one at the foot and the other at the side

[1] See, *accord.*, *Osborn* v. *Cook*, 11 Cush. 532 (1853).

of the bed. When the nephew returned with the codicil (which he had prepared in another room), into the deceased's bed-chamber, he read the same over, in the presence of White, the deceased's footman, Clarke, the servant whose legacy was increased by the codicil, and the nurse to the deceased, who in their presence and hearing, expressed his approbation thereof; the deceased then signed the codicil, in the presence of the same persons, except that one of them (White, the footman) did not actually see him sign the paper, as he was standing by the fire, where the curtains of the bed were closed. The nephew then subscribed his name, as attesting the execution, and proposed that White should do the same; previous to which, he again read the paper to White, in the presence and hearing of the testator. White then attested the codicil, signing it upon the small table placed between the foot of the bed and the fire, where the curtains were still closed, so that the testator might not have seen him sign.

The Queen's Advocate and *Haggard* opposed the allegation.

Addams and *Robertson*, in support of the allegation.

Sir Herbert Jenner. The word "present" occurs in the Statute of Frauds, and the meaning of that word has been a subject of discussion in the cases referred to. In the present case, the first consideration is, under what circumstances the execution took place. It took place in the chamber where the deceased lay, which was small (not a large one, where he could not see what was going on), and the probability is, that all that was going on was heard by the deceased, the bed-curtains being open on both sides, and only closed at the foot, to screen him from the fire. All the other requisites of the Act were complied with, but it is said White could not see the testator sign his name, nor the testator see him attest his signature. To be sure it appears somewhat strange to say, that what was done by a person in the same room, and in the hearing of another person, was not done in his presence. As far as the words of the Act go, I should be of opinion, without reference to the cases, that the witness, being in the same room, was present. The object of the Act is to prevent the substitution of another paper, and that no fraud should be practised on the deceased. I should, therefore, hold that this is a sufficient attestation in the presence of the testator, and a sufficient compliance with the Act of Parliament. The several cases referred to, were questions under the Statute of Frauds, where wills were attested in a different room from that where the testator was. In one of those cases (that of *Casson* v. *Dade*, 1 Bro. Ch. Cas. 99), the doctrine of constructive presence was carried to a great length, for the testatrix executed the will in her carriage, standing at the office of her solicitor, the witnesses retiring into the office to attest it, and it being proved that the carriage was accidentally put back, so that she was in such a situation that she might see the witnesses sign the will through the window of the office; and this was held to be tantamount to being present: she had not ordered her carriage to be put back, and yet it was held that the attesta-

tion was constructively in her presence. In this case, no suspicion of fraud can be suggested; the party employed the residuary legatee to prepare the codicil, and he will be a sufferer to the extent of the legacy.

I am of opinion, that under the Act, where a paper is executed by the deceased, in the same room where the witnesses are, and who attest the paper in that room, it is an attestation in the presence of the testator, although they could not actually see him sign, nor the testator actually see the witnesses sign; and if the facts pleaded in this allegation are proved to the satisfaction of the court, I must pronounce for the validity of the codicil. *Allegation admitted.*[1]

The executors afterwards took probate of the codicil.

GOODS OF COLMAN.

PREROGATIVE COURT OF CANTERBURY. 1842.

[*Reported* 3 *Curt.* 118.]

EDWARD COLMAN died at Naples, on the 2d of April, 1842. On the 25th of March, the deceased being ill in bed, two persons were called into his bed-room for the purpose of seeing him sign his will, and to attest its execution; the deceased then signed the will, in the presence of those two persons, but being apparently exhausted by the effort, the witnesses retired into an adjoining room, which communicated with the bed-room by folding doors, each of the width of about eighteen inches, and which were open at the time, being tied back by strings, and the witnesses there subscribed their names to the will on a table, which was so situated, that it was impossible for the deceased to have seen them.

Addams prayed probate.

SIR HERBERT JENNER FUST. I know of no case which would authorize the court to hold that this will was attested and subscribed by the witnesses in the presence of the deceased; had the deceased been in such a situation that he might have seen the witnesses subscribe their names, it might have been held to have been done constructively in his presence, as in the case where a lady sat in her carriage, whilst the will was attested in a solicitor's office, in which she might have seen the witnesses sign their names. Here it was impossible for the deceased to see the witnesses. I reject the motion.[2]

[1] In *Brooks* v. *Duffell*, 23 Ga. 441 (1857), it does not clearly appear whether the testator was able to move.

[2] See, *accord.*, *Doe* d. *Wright* v. *Manifold*, 1 M. & S. 294 (1813); *Jones* v. *Tuck*, 3 Jones, 202 (1855). In *Moore* v. *Moore*, 8 Grat. 307 (1851) the Court of Appeals of Virginia were equally divided on the question whether an attestation in a room adjoin-

MOORE *v.* KING.

PREROGATIVE COURT OF CANTERBURY. 1842.

[*Reported* 3 *Curt.* 243.]

ROBERT KING died on the 16th of August, 1842. By his will, dated the 22d of March, 1841, he appointed C. H. Moore, and his brother E. R. King to be his executors, and named his said brother his residuary legatee.

On the 8th of August, 1842, the deceased, being confined to his bed by illness, requested his sister, Mrs. Coape, to bring him materials for writing, and upon her doing so, he wrote a codicil (A) in the presence of Mrs. Coape, and she, at his request, subscribed her name thereto in his presence; no other witness was present at the time.

On the 8th of August, 1842, Sir D. Davies, the medical attendant of the deceased, paid him a visit, on which occasion the deceased requested Mrs. Coape to give him the paper (A), and showing the same to Sir D. Davies, said, "This is a codicil to my will, signed by myself and by my sister, as you will see at the bottom of the paper, you will oblige me if you will also add your signature, two witnesses being necessary." Sir D. Davies thereupon placed the paper on a chest of drawers by the bedside of the deceased, and subscribed his name thereto, Mrs. Coape, standing beside him at the time, said, pointing to her name signed at the bottom of the paper, "There is my signature you see, you had better place yours underneath."

On the 7th of November, 1842, the court was moved to admit this paper (A) to probate, the court rejected the motion, and directed the paper to be propounded. An allegation was given in by the executor, Mr. Moore, propounding the paper, and was opposed by Mr. King the other executor and residuary legatee.

R. Phillimore opposed the admission of this allegation.

H. I. Nicholl, in support of the allegation.

SIR HERBERT JENNER FUST. The question before the court is one of great importance with regard to the construction of the Will Act (1 Vict. *c.* 26). It turns upon the due execution of a paper bequeathing personal property, which is now regulated by the same law as regulates the disposition of real property. The duty imposed upon the court is to find its way to a due and proper construction of the whole of the Act; not of one single isolated clause, but of the entire inten-

ing that in which the testator was lying was good, when the testator could not see the witnesses, but might have seen them by leaning over the foot of his bed.

See *Wright* v. *Lewis*, 5 Rich. 212 (1851), where the testator after signing the will in the presence of the witnesses walked into the next room. In this case, however, the charge of the presiding judge seems to have been unexceptionable, and no question of law on this point to have arisen.

tion of the Legislature in passing the Act. This case must form a leading case of its class; two other cases, of a similar nature, have been brought before the court, but only on *ex parte* motion, unfortunately they were cases, where the property involved in the decision was so small, as to render them unable to bear the expense of litigating the point. As far as I am able to judge, the present case differs in some respects from both those cases. In the *Case of Allen*, 2 Curt. 331, the paper was attested by the one witness alone present on one day, the deceased having then signed it in her presence; on a subsequent day it was signed in the presence of a second witness, and attested by that witness in the presence of the first, but the first witness was not called on to attest the second execution. The court was of opinion that the execution was not sufficient. The other case of *In re Simmonds*, 3 Curt. 79, was very similar. In this case, as has been observed, there is this material distinction; the deceased having in the first instance signed the paper in the presence of his sister alone, does on a subsequent day acknowledge his signature in the presence of his sister, and his sister pointed out her signature to the second witness, but I do not understand, that the deceased desired her to re-attest the acknowledgment of his signature. I admit all that has been said as to the construction of Statutes, and the interpretation put upon the Statute of Frauds as to signing by the testator, but is the same interpretation applicable to the subscription of the witnesses? It has been argued, under the present Statute, as against the admission of this allegation, that although this might have been a good subscription under the Statute of Frauds, it is not sufficient under the altered language of the present Act; on the other side, it has been said, that a construction is to be put on this Act the same as if on the Statute of Frauds; but it must be remembered, that the doubts, expressed by judges of courts of law and equity on the Statute of Frauds, led to the introduction of the present Act. It has been well said, that the 1 Vict. *c.* 26, is not an original Act, but an Act to amend a former law; so it is, — it is an Act to amend a former law, for removing all doubts whatever existing with regard to that law, and I find in the 9th section of the new Act, a considerable departure from the language of the corresponding section (5th) of the Statute of Frauds. The language of the 9th section of 1 Vict. is expressly prohibitory, "No will shall be valid unless it be in writing, and signed at the foot or end thereof," — clearly thereby intending to remove all doubts, in regard to the construction of the Statute of Frauds, as to signing by putting the testator's name at the beginning of the will; — "and such signature shall be made or acknowledged by the testator," — it had been formerly doubted, under the Statute of Frauds, whether an acknowledgment of the signature was sufficient, whether the will must not be actually signed in the presence of the witnesses; here again, all doubt is removed by the present section. Under the Statute of Frauds it had been held, that the witnesses need not be all present at the same time, the signature might be

acknowledged to the three or more witnesses at different times; — again, by the present Act, all doubt on that point is removed, the witnesses must be present "at the same time." Now when I clearly find, that the object of this Act is to remove every possible doubt, — thereby taking away all latitude and discretion in its interpretation, — and that it expressly provides that the two witnesses, who *are to be present at the same time*, shall attest and subscribe, can I hold that the one may attest and subscribe on one day, and acknowledge his or her signature on a subsequent day? I am inclined to think that the Act is not complied with, unless *both witnesses* shall attest and subscribe *after* the testator's signature shall have been made and acknowledged to them when *both* are actually present at the same time. If the one witness has previously subscribed the paper, and merely points out her signature when the testator acknowledges his signature in her presence, and in that of the other witness which latter witness alone then subscribes, that I hold not sufficient; I have no explanation why the first witness did not re-subscribe. The Act says the testator may *acknowledge* his signature, but does not say that the witnesses may acknowledge their subscriptions. I reject the allegation.

GOODS OF PIERCY.

PREROGATIVE COURT OF CANTERBURY. 1845.

[*Reported* 1 *Rob. Ecc.* 278.]

CHARLOTTE PIERCY died in February, 1845, having just before her death executed her will. She was very ill in bed, and totally blind, but in full possession of her mental faculties. The will was prepared according to her directions, and read over to her. In the presence of the attesting witnesses she signed her name in bed, one of them having placed her hand on that part of the paper where it was necessary for her to sign. By reason of there not being any table or other convenience in the bedroom on which the witnesses could sign their names, they all proceeded immediately to an adjoining room on the same floor, across a landing or passage, and there within view of the bedroom, the doors of both rooms being open, respectively subscribed their names. A plan of the rooms was laid before the court, and in a second affidavit it was sworn, that the testatrix, from her bed, could have seen the witnesses at the table when they signed, had she had her eyesight.

Addams, on these facts, moved the court for probate.

SIR HERBERT JENNER FUST. When this case was moved on a former occasion, there was no evidence to show that the testatrix could have seen the witnesses sign, had she had her eyesight, and I felt I could

not place her in a better position than one who could see. It does not appear whether there were curtains to the bed; still, as it is positively sworn by two witnesses that she could, had she had her sight, have seen from her bed the witnesses subscribe, I cannot refuse this application.

TRIBE *v.* TRIBE.

PREROGATIVE COURT OF CANTERBURY. 1849.

[*Reported* 1 *Rob. Ecc.* 775.]

THIS was a case of proving a will of Frances Tribe, who died December 23, 1848, the same day on which the will was executed.[1]

SIR HERBERT JENNER FUST. . . . There is another question, namely, whether there has been a due compliance with the Act. The witnesses are at variance in their statements. Mary Tribe, the drawer of the will, and an interested witness, swears the curtains of the bed in which the testatrix lay were not closed, and that the attesting witnesses signed in the testatrix's sight; on the other hand, the attesting witnesses swear not only that the curtains were closed, but that it was from the circumstances they state physically impossible that the testatrix could have seen them sign. I must take the statement of the attesting witnesses to be the correct version; that not only were the curtains closed, but that had they not been closed, it was impossible, from the state in which the testatrix was, for her to have turned herself in her bed so as to have seen the witnesses sign. Under this state of circumstances what difference would there have been, on principle, if the witnesses had signed the will downstairs? The decision in *Newton* v. *Clarke*, 2 Curt. 320, was, I consider, right; but were I to hold the attestation in the present case good, I should go infinitely beyond that case. I cannot consider that there has here been a due compliance with the requisites of the Statute, consequently I pronounce against the will propounded, that of December, 1848; but beyond recommending the opposing party to pay the costs, I give no order respecting them.[2]

Addams, in opposition to the will.

Harding and *R. J. Phillimore*, contra.

[1] The statement of facts is omitted.

[2] So, *Neil* v. *Neil*, 1 Leigh, 6 (1829); and see *Reed* v. *Roberts*, 26 Ga. 294 (1858).

GOODS OF TREVANION.

PREROGATIVE COURT OF CANTERBURY. 1850.

[*Reported* 2 *Rob. Ecc.* 311.]

ELIZABETH TREVANION, of Bristol, died, a spinster, in June, 1850, leaving as her only next of kin an aunt by the half-blood, the only person who would have been entitled to the personal estate had she died intestate.

On the 4th April, 1843, the deceased duly signed her will in duplicate, which was also duly attested by Dr. Budd and Mrs. Hester Bisse; the latter witness, after signing her name, added in the same line, as a description of her residence, "22, Park Street."

Under the will Dr. Budd was the principal legatee; and in consequence of the testatrix having discovered that the bequests to him would be void in law, she, about the 6th April, according to the joint affidavit of Mrs. Bisse and of Leopold de Soyres, the latter of whom, at the request of the testatrix, struck through with a pen the name of Dr. Budd as a witness, re-executed her will in duplicate by "acknowledging her aforesaid signatures in both the said papers, and also to the best of these deponents' recollection and belief with a pen went over and retraced such signatures, and she further declared such papers to be and contain her will in the presence of these deponents, both present at the same time, and thereupon this deponent, the said Hester Bisse, attested the testatrix's said signature so acknowledged, to wit, by adding the word 'Bristol' at the end of her this deponent's name then already written as aforesaid"[1] . . . "in both the said paper-writings in the presence of the said testatrix and of this deponent Leopold de Soyres," who also duly attested the testatrix's signature, &c., in the presence of the testatrix and Mrs. Bisse.

Addams, in moving for probate of the paper as last executed, contended there was an act done by Mrs. Bisse, which in law was sufficient.

SIR HERBERT JENNER FUST. There was no act done by Mrs. Bisse except by her adding to her place of residence the word "Bristol." That I conceive is no proof of an attestation to the signature of the testatrix, and I cannot hold that to be an attestation by a witness. I reject the motion.

Probate may issue with the consent of Dr. Budd, the person interested, but I would not do that much, were this not the last day of the sitting of the court prior to the Long Vacation.

[1] The word "Bristol" was written immediately in a line with and *after* "Park Street."

NORTON *v.* BAZETT.

PREROGATIVE COURT OF CANTERBURY. 1856.

[*Reported Deane*, 259.]

THE deceased left a will in his own handwriting, executed according to the evidence of the subscribing witnesses, under the following circumstances: —

During the morning he was engaged in writing in the private or inner room of the office, in which room the deceased and his partners usually sat. The outer room was the clerks' office, where the witnesses sat; the private room was entered from the outer room by a door which was habitually kept wide open, that is, the door was habitually rather more open than it would be if standing at right angles with the wall. The deceased was a particular man with reference to his clerks, and the door was kept thus open to enable him to look after them. It stood open in this way on the morning in question, and during the morning the witnesses passed into the deceased's room several times, and observed that he was engaged writing on his private affairs. This was apparent to them from the nature of the paper on which he was writing. Between two and three o'clock in the afternoon the deceased, being still in his room, called to the witnesses to come to him, and on entering they saw him sitting at his table with two sheets of the said paper before him, both written upon. His table was in the centre of his room, and he was sitting at it, with his back towards the partition wall between his room and theirs. As they passed through the doorway his chair was a little on their left hand. Immediately as they entered, the deceased said, "This is my last will and testament which I have made, and I request you to witness my signature." The two sheets of letter paper before mentioned lay before him at the time, and he at once signed his name "William Norton" at the end of the will on the second of the two sheets of paper, in their presence. They were both standing by his side at the time, and he remained sitting in his chair. He then handed to them the last sheet of the will, and requested them to sign their names to it, and to add the words "Witnesses to the signature of William Norton." The table in the deceased's room was full of papers, and so, for convenience in signing, they took the said last sheet to their desk in the outer office; the other sheet of the will remained on the deceased's table. They went into the outer office and there signed their names respectively to the said last sheet in each other's presence, standing whilst they did so at that corner of the desk which was nearest to the said doorway. They so signed their names as witnesses, and added the words "Witnesses to the signature of William Norton." The desk could be seen from some parts of the said

private room, but not from all parts of it, and not from that part at which the deceased was sitting when they left the room to sign their names. He was then sitting with his back to the door; his chair was not two yards from the partition wall; and if he had moved a yard to his right hand from his chair, he could have seen the desk and witnesses as they signed their names; whether he did so move, the witnesses had no means of saying. As soon as they had signed their names, one of them returned alone into the inner room with the second sheet of the will, and gave it to the deceased, who then read over the signatures. When the will was brought back the deceased was standing up at that side of his table which was parallel with the said partition wall, with his back to the wall, and exactly in front of the chair on which he had been sitting when they left the room. He was apparently arranging his papers before leaving the office. How long he had left his chair they could not judge. They neither saw nor heard him between their leaving and returning to his room. The door between the two rooms remained open during all the transaction. They were absent from the deceased's room about two minutes whilst so signing their names.

Sir J. D. Harding, Q. A., and *Twiss*, in support of the will.

Jenner and *Deane*, contra.

Sir John Dodson. The question in the present case is, whether the witnesses subscribed their names to the paper propounded in the presence of the testator within the meaning of the word "presence" used in the 9th section of the Wills Act. The will is in the deceased's handwriting, on two sheets of paper, dated at the beginning the 13th, and at the end the 14th of July, as if he had been occupied two days in writing it out. The witnesses state that on the 14th he was busy in the inner room of his office writing on private affairs during the morning; that in the afternoon he called them into that inner room, from the outer room in which they sat, signed his name in their presence, and desired them to attest his signature, whereupon they returned to the outer office, wrote their names, and one of them brought back the paper. The door between the two rooms was open; but it appears from the evidence, and the plan which was brought in, that the place where the deceased sat in the inner room, with his back to the wall between the two rooms, was not visible to the clerks standing at the desk where they wrote their names. They could not see the deceased, nor could he see them, unless he had got up from the chair, and moved some two or three steps towards the open door. The evidence is, further, that when the clerk who brought the will came into the room, the deceased had risen from his chair, but was standing in front of that chair — had in fact merely got up to sort his papers, or for some such purpose; and there is no evidence whatever to show that he moved from the table to any part of the room from which he could see the witnesses.

In the course of the argument many, if not all, the cases which could assist the court in forming its judgment were cited. In *Newton* v. *Clarke*, 2 Curt. 320, the whole transaction took place in one small

room, with only the curtain at the foot of the bed to interrupt the view; and Sir H. Jenner held the will to be well executed, observing that it would be somewhat strange to say that what was done by a person in the same room, and in the hearing of another person, was not done in his presence. *Hudson* v. *Parker*, 1 Rob. 14, has not, I think, any very great bearing upon the present case. *Tribe* v. *Tribe*, however, in the same volume, page 775, seems, until closely examined, at variance with *Newton* v. *Clarke;* but it is clear that in *Tribe* v. *Tribe* it was proved that the deceased could not by possibility have seen the witnesses, and on that ground it was held that although the witnesses subscribed in the same room, still they did not so subscribe in the presence of the deceased. I should observe that most of the cases cited by counsel were also cited in *Newton* v. *Clarke*. In 3 Curt. 118, there is the case *In the Goods of Colman*, which very closely resembles the present; and I can find no more sure or certain guide for my instruction than that case. The only distinction is, that there the deceased could not have moved — here he was in a situation where he could not see without moving; and upon this distinction it has been suggested that he might have moved, and then he would have seen; but there is no proof in support of the fact suggested; there is no proof whatever that he did move; and I think it is too much for the court to presume, that in the short space of time occupied by the witnesses in signing their names he did move. The conclusion to which I must come is, that where the witnesses subscribe in a different room from that in which the testator is, they must be shown to have subscribed in a position visible to the testator; that is not proved here, and I must pronounce against this will. I do so with much regret, but I have no discretion; and judging for myself, and in my own conscience, I cannot hold that there was a constructive presence such as would justify this court, whatever the Court of Appeal may do, in pronouncing for this will.

HINDMARSH *v.* CHARLTON.

HOUSE OF LORDS. 1861.

[*Reported* 8 *H. L. C.* 160.]

THE respondent had instituted a suit in the Probate Court against the present appellant, for the purpose of obtaining letters of administration of the personal estate of Joseph Hindmarsh, deceased, who died on the 26th December, 1857, leaving her, his sister (married to Thomas Charlton) his next of kin. She alleged that her brother died intestate. The appellant pleaded that the brother did not die intestate, but on the 17th of December, 1857, made and duly executed a will, under which the appellant claimed as residuary legatee. The parties

being thus at issue, the Court of Probate made an order for trial, and the issue came on for trial at the Durham Spring Assizes in 1859, before *Mr. Justice Byles;* when, under the direction of the learned judge, the jury returned a verdict for the defendant, declaring the will to have been duly executed, but leave was reserved to the Court of Probate to enter the verdict for the plaintiff in the suit, that court being at liberty to draw inferences of fact, if it should think fit to do so. A motion for that purpose was accordingly made before the Judge Ordinary. The notes of the evidence taken at the trial were furnished by Mr. Justice Byles, and were to the following effect: Dr. Blair White, a physician at Newcastle, said, "I attended Joseph Hindmarsh. On the 17th December, 1857, I went into Hindmarsh's bedroom; two papers were produced by the housekeeper in the presence of Hindmarsh. Mr. Wilson, the other medical attendant, was present. I gave the papers into Hindmarsh's hands, and asked, if that was his signature. Hindmarsh put on his spectacles, examined the paper and the signature, and said, 'Most decidedly this is my handwriting, and this is my will.' This was in the presence of Mr. Wilson and myself. I took the will from Hindmarsh's hand and signed it in that room. I remember Mr. Wilson signing the date, because I requested him to do so." Mr. Frederick William Napoleon Wilson, surgeon, said, "On the forenoon of the 17th December, 1857, I saw Mr. Hindmarsh. I was asked by him to sign his will as a witness, and the will was brought out, both parts. He looked at it, and said that was his will. I wrote at the bottom, 'Witness to the above will and testament and signature,' and then my name, 'Fred. Wm. Nap. Wilson,' on both papers. In the afternoon, Dr. White came. In the room Dr. White examined the patient as to his health. The doctor and I then went into the other room, where we had a consultation. I had suggested to Hindmarsh before we left the room, that he had better have another witness. Dr. White took the will in his hand, and we went back to the room where Hindmarsh was. Dr. White asked Hindmarsh if that was his will. He said, 'Well, I can't see very well, get me my spectacles.' The housekeeper gave him his spectacles, and he sat up in the bed, and looked at the paper, and said, 'Yes, that is my will, and this is my signature.' At a small table, at the head of the bed, and close to the bed, Dr. White signed his name. After he had signed it, I took the papers and went across to the window, where there was another table, and sat down in an arm-chair; and then, after some conversation about the date being added, I distinctly remember retouching my name, by putting a cross on the *F* on the paper which is uppermost, and then I added the date in both wills, and then, I believe, the documents were both given to the housekeeper." On cross-examination, he said, "I very often omit to put a cross at all, and where I find it has not been done I always put it. I had noticed the omission of the cross. I had always been in the habit of supplying the omission. This was merely in pursuance of my habit. . . . I thought it was better to complete

the name. I thought adding the date was equal to a repetition of the signature. I think I had no other intention. It was by the date I intended to repeat my signature. My sole object was to supply the omission, to make the name complete. I was attesting the will, and I thought it necessary to have a complete signature. My object was to make the signature of the morning complete."

The cause was heard before the Judge Ordinary, and on the 18th May, 1858, judgment was pronounced in favor of the plaintiff in the suit, on the ground that the facts proved did not amount to a due attestation of the will according to the provisions of the 1 Vict. *c.* 26. The verdict for the defendant was, therefore, ordered to be set aside, and a verdict entered for the plaintiff. This was an appeal against that decision.

Mr. Manisty and *Mr. Heath*, for the appellant.

The Solicitor-General (*Sir W. Atherton*) and *Dr. Spinks*, for the respondent.

THE LORD CHANCELLOR. [LORD CAMPBELL.] My Lords, these are very distressing cases for judges to determine. I may honestly say that we have a strong inclination in our minds to support the validity of the will in dispute, which the parties *bona fide* made, as they believed, according to law, and where there is not the smallest suspicion in the circumstances of the case. But we must obey the directions of the Legislature, and we are not at liberty to introduce nice distinctions which may bring about great uncertainty and confusion. Having heard the case very lucidly and ably argued on both sides, I am of opinion that the learned judge of the court below came to a right conclusion in holding that this will was not made in accordance with the requirements of the Legislature.

The Act of the 1 Vict. *c.* 26, § 9, requires that a will to be valid "shall be signed at the foot, or end thereof, by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowleged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator." It is settled by the case of *White* v. *The British Museum*, 6 Bing. 310, and other decisions to the same effect, that after the will has been signed or acknowledged by the testator in the presence of both the witnesses, there must be the subscription of the witnesses in the presence of the testator. The question in this case is, whether that which took place was a subscription of the witnesses, whose subscription is in question, or not. I will lay down this as my notion of the law: that to make a valid subscription of a witness, there must either be the name or some mark which is intended to represent the name. But on this occasion the name is not written, nor do I think that there was anything written that was meant to represent the name. The horizontal stroke made by the witness was merely intended to perfect the letter *F* in the same manner as if he had perfected the letter *i* by putting a dot over it,

which he had not dotted in the morning. Now, can that be considered as amounting to a subscription? It was an acknowlegment by him of his former signature written in the morning, but it is not a new subscription. It has been solemnly determined that an acknowledgment by a witness of his signature is not sufficient. When I was at the bar, there was a question whether the acknowledgment of the signature, by a witness putting a dry pen over it would be sufficient, but since that time it has been decided that it would not be sufficient; but this does not, in my opinion, amount to a subscription, because whether the *i* was dotted, or the horizontal stroke was put to the *F*, to perfect the word, it was not intended that either the dot or the horizontal stroke should represent the name; the name was written in the morning, and that would continue both till and after the evening, as the subscription of the witness.

I regret very much that we are compelled to hold this instrument to be an invalid will, but we are constrained so to do by the Act of Parliament; and therefore I must advise your Lordships that this appeal be dismissed.

Lord Cranworth. I concur with my noble and learned friend in having a sort of personal feeling of regret that this will cannot be sustained as a valid will. It appears to be a reasonable will, and a will as to which there is not the least suspicion of anything like fraud or imposition. But for the security of mankind, the Legislature has thought fit to prescribe certain forms and rules which are necessary to be complied with, in order to authorize a distribution of property, different from that which the law would make if there was no will; the Legislature, in truth, on these forms being complied with, putting into the hands of the party who is making a will, power to dispose of his property in a way contrary to what, but for the will, would be the provision of the law. That it is reasonable that, under these circumstances, there should be some rules to be acted upon, no one can doubt; and those rules being established, this House, as the ultimate court of appeal, would be, I think, ill discharging its duty to the public if it were to listen to suggestions of minute differences which would not meet the ordinary apprehensions of mankind, and which would necessarily or naturally lead to great discussion and litigation.

It has been determined, upon the construction of the last Statute, and quite rightly determined, that there must be a subscription by two witnesses after the testator has signed the will in their presence, or acknowledged his signature in their presence. In this case, the testator acknowledged his signature in the presence of two witnesses, but it is certain that there was not here a subscription, after the testator had so acknowleged the will, by Mr. Wilson, one of the witnesses, unless his putting a mark across the letter *F* (or *T* as it would have stood without the cross) amounts to a signature by him. Upon that subject, I entirely concur with my noble and learned friend, for I do not think that you could suppose anything so absurd as that when he wrote the words Frederick

William Napoleon Wilson in the morning, he did not mean that to be his signature, but that he intended the mark, which he afterwards put, to be his signature; but unless you suppose that, there was no subscription by Mr. Wilson after the acknowledgment by the testator, in the presence of two witnesses, that that was his will. His putting the cross to the letter *F* in the afternoon cannot be said to be his subscription. The acknowledgment of his signature by a testator is sufficient, but a witness stands in a different position. After the signature of the will by the testator his acknowledgment will do; but by the express terms of the Statute, that will not do with regard to the witness. If he had said nothing at all, the putting a mark across the *F* might have amounted to an acknowledgment of his signature; but that will not do, and yet the facts here cannot amount to more than that.

Upon these short grounds, for the case lies within a very narrow compass, I concur with my noble and learned friend, that this instrument cannot be taken to be a will duly executed by this alleged testator.

Lord Chelmsford. I regret to have to agree with my two noble and learned friends, that the will was not duly executed, as required by 1 Vict. *c.* 26. To render a will valid, the signature or acknowledgment of the testator must be in the presence of two witnesses, present at the time, and the witnesses must attest and subscribe the will in the presence of the testator. Now, upon witnessing the will in the forenoon of the day of its execution, Mr. Wilson subscribed his name, intending that it should be a complete signature. It was, of course, insufficient as a complete subscription under the Act, because only one witness was present, and if it had been left without anything more having been done by Mr. Wilson, no question of the imperfect attestation and subscription of the will could possibly have existed. And the question is, whether what was done in the afternoon, when a second witness was present, would make a complete attestation and subscription.

Mr. Wilson certainly intended to subscribe as a witness in the afternoon. But he thought that adding the date was equivalent to a repetition of the signature. Did this amount to a second subscription? Suppose Mr. Wilson had not subscribed his name in the morning, and in the afternoon had merely put the date, could that have been considered to be such a subscription as the Act requires? The subscription must mean such a signature as is descriptive of the witness, whether by a mark or by initials, or by writing the full name; and if the date alone would not do, of what efficacy can it be towards completing the subscription?

If Mr. Wilson in the morning had left his signature incomplete by the omission, for instance, of his surname which he had added in the afternoon, that would have been a subscription which would have satisfied the requisitions of the Act. For there would really have been only one complete subscription. But the omission of the cross to the *F* in

his Christian name, did not make the signature imperfect. For Mr. Wilson states, that he very often omitted to put the cross at all; and he did not add the cross to complete his signature, so as virtually to subscribe anew, but merely in pursuance of his habit of supplying the omission when he noticed it.

The words of the Act appear to me to be quite clear in prescribing what shall be necessary to render a will valid. And of course no equivalent can be substituted for its plain requisitions. However much, therefore, we may regret that the will of the testator should be disappointed by an accidental omission, where all parties intended to comply with the directions of the Act, yet we are bound by the express and clear language of the Legislature; and, however reluctantly, we are compelled to pronounce the will to be invalid.

THE LORD CHANCELLOR. The appeal will be dismissed without costs.

Decree affirmed, and appeal dismissed without costs.

GOODS OF MADDOCK.

COURT OF PROBATE. 1874.

[*Reported L. R.* 3 *P. & D.* 169.]

ELIZABETH MADDOCK, late of Castle Northwick, Cheshire, widow, deceased, on the 16th of June, 1861, executed her will by making a mark at the foot thereof in the presence of Joseph Clare and Samuel Birtwistle. Joseph Clare thereupon attested and subscribed the same as witness by signing his name, and Samuel Birtwistle attempted to do so also, but after making the letters or marks appearing on the will under the name of Joseph Clare — that is to say, the word "Saml." — he, being old and infirm, found he could not complete his signature legibly, and desisted. Joseph Clare then struck through with a pen the word "Saml." so written, as of no effect, and sent for Joseph Birtwistle, the son of Samuel Birtwistle. On his arrival the will was again read over to the deceased, who thereupon made her mark with a pen and ink over her former mark, in the presence of Joseph Clare and Joseph Birtwistle. Joseph Clare traced over his original signature with a dry pen and Joseph Birtwistle signed his name to the will as witness.

Bayford moved for probate of the will.

Cur. adv. vult.

SIR J. HANNEN. This was a question as to the execution of a will. The deceased signed her will in the presence of two witnesses, one of whom attested her signature by subscribing his name; the other commenced to write, but being an old man and having a difficulty in doing

so, after having got as far as "Saml.," his Christian name, he could get no farther, and thereupon the other witness struck out the word "Saml." and sent for another person. This person having come in, the deceased made a mark with a pen over her former mark; and the first witness, instead of re-writing his name, used a dry pen to his signature. Such a subscription has been held to be insufficient: *Casement* v. *Fulton*, 5 Moo. P. C. 130; *Playne* v. *Scriven*, 1 Rob. 772. This second attempt at execution having failed, the question arises whether the court can treat the writing of the letters "Saml." by the witness as a sufficient subscription on his part. I take it as a rule that if a witness makes any mark with an intention thereby to subscribe the will, it will be sufficient. The very imperfect signatures of witnesses and testators to be found in wills are illustrations of this rule. But the Statute requires that a party shall intend, by what he does, to subscribe, and in this case I think the witness has failed to do what was necessary. In *Hindmarsh* v. *Charlton*, 8 H. L. C. 160, the deceased having signed his name in the presence of one witness, who attested the same, afterwards acknowledged his signature in the presence of that witness and another. The first witness on such acknowledgment merely crossed the first letter of his Christian name (Frederick) and added a date. He gave his reason for doing so as follows: "I very often omit to put a cross at all, and where I find it has not been done I always put it. I had noticed the omission of the cross. I had always been in the habit of supplying the omission. This was done merely in pursuance of my habit; I thought it better to do so. I thought adding the date was equal to a repetition of the signature; I think I had no other intention. It was by the date I intended to repeat my signature. My sole object in crossing the *F* was to supply the omission to make the name complete; I thought it necessary to have the name complete." In that case the execution was held to be insufficient. In giving judgment the Lord Chancellor (Lord Campbell) said: "Now, then, the question in this case is, whether that which took place was a subscription of the witness, whose subscription is in question, or not. I will lay down this as my notion of the law, that to make a valid subscription of a witness there must either be the name or some mark which is intended to represent the name. But on this occasion the name is not written, nor do I think that there was anything written that was intended to represent the name." Lord Cranworth concurred with the Lord Chancellor on this point, and Lord Chelmsford made the following remarks: "Upon witnessing the will in the forenoon of the day of execution Mr. Wilson subscribed his name, intending that it should be a complete signature. It was insufficient as a complete subscription under the Act, because only one witness was present; and the sole question is whether what was done in the afternoon, when a second witness was present, would make a complete attestation and subscription. Mr. Wilson certainly intended to subscribe as a witness in the afternoon, but he thought that adding the

date was equivalent to a repetition of the signature. . . . The subscription must mean such a signature as is descriptive of the witness, whether by a mark or by initials, or by writing the full name; and if the date alone would not do, of what efficacy can it be towards completing the subscription? If Mr. Wilson in the morning had left his signature incomplete by the omission, for instance, of his surname, which he had added in the afternoon, that would have been a subscription which would have satisfied the requisitions of the Act, for there would really have been only one complete subscription; but the omission of the cross to the *F* in his Christian name did not make the signature imperfect, for Mr. Wilson states he very often omitted to put the cross at all, and he did not add the cross to complete his signature so as virtually to subscribe anew, but merely in pursuance of his habit of supplying the omission when he noticed it." I have come to the conclusion that I must reject this application, being of opinion that the witness did not put the word "Saml." on the paper with the intention at the time that it should be a perfect subscription to the will. Having done something, he broke off without completing the intention. In the case of *In the Goods of Sperling*, 3 Sw. & Tr. 273, the witness did not sign his name, but merely the words "Servant to Mr. Sperling;" and the court thought the attestation sufficient, by reason that the witness wrote them intending thereby an identification of himself as the person attesting. The act in this case is not sufficient to show such an intention, so as to amount to a subscription to the will.

GOODS OF GUNSTAN.

PROBATE DIVISION. 1882.

[*Reported* 7 *P. D.* 102.]

ACTION commenced in the Probate Division by Henry Blake, claiming probate in solemn form of a document alleged to be the last will of Mary Gunstan.

Sir J. Hannen, President, rejected proof of the will; and William Willoughby Gunstan, a legatee under the will, who had obtained leave to intervene, appealed.

Dr. Deane and *Dickens*, for the appellant.

Inderwick, Q. C., *C. A. Middleton*, and *T. Lee Roberts*, contra.

JESSEL, M. R.[1] I regret that I am unable to come to the conclusion that this will was properly executed. I say I regret, because from a mere accident, a want of form, that which was clearly the last will of this lady must fail of effect, and the persons interested under it be disappointed.

[1] Only the opinions on the appeal are here given.

The real question is, what the law requires to be proved in order to support a will so that it shall be validly executed.

In this case it does not appear that the testatrix signed her name to this document in the presence of the witnesses. I invited the counsel for the appellant to argue the question upon the basis of these witnesses having seen the lady sign her name, but I agree that Dr. Deane knew more of the case than I did, and was wise in declining to argue it on that footing, for on careful examination of the evidence in this case I think it is clear that this will was not signed in the presence of either witness; it is evident that the signature took place before they came into the room. The question, then, arises whether the testatrix acknowledged her signature before the witnesses. What is in law a sufficient acknowledgment under the Statute? What I take to be the law is correctly laid down in Jarman on Wills, 4th ed. p. 108, in the following terms: "There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by them is his will;" and I may add, in my opinion, it is not sufficient even if the testator were to say, "My signature is inside the paper," unless the witnesses were able to see the signature. There is a great deal of authority on this point, several cases are referred to in the note to the passage which I have read, but I think it is sufficient to mention three cases only. The first is *Hudson* v. *Parker*, where, 1 Rob. 25, the matter is most elaborately discussed by Dr. Lushington. He tells us what in his view is the plain meaning of acknowledging a signature in the presence of witnesses; he says, "What do the words import but this? 'Here is my name written, I acknowledge that name so written to have been written by me; bear witness.' How is it possible that the witnesses should swear that any signature was acknowledged unless they saw it? They might swear that the testator said he acknowledged a signature, but they could not depose to the fact that there was an existing signature to be acknowledged. It is quite true that acknowledgment may be expressed in any words which will adequately convey that idea, if the signature be proved to have been then existent; no particular form of expression is required either by the word 'acknowledge' or by the exigency of the act to be done. It would be quite sufficient to say 'that is my will,' the signature being there *and seen* at the time; for such words do import an owning thereof; indeed, it may be done by any other words which naturally include within their true meaning, acknowledgment, and approbation."

Now I have to consider the case of *Beckett* v. *Howe*, Law Rep. 2 P. & D. 1, where a different rule was laid down by Lord Penzance. At page 5 he says, "The doctrine of *Gwillim* v. *Gwillim*, 3 Sw. & Tr. 200; 29 L. J. (Pro.) 31, is this, that if the testator produces a paper and gives the witnesses to understand it is his will, and gets them to sign their names, that amounts to an acknowledgment of his signature, if the court is satisfied that the signature of the testator was on the

will at the time. Whether that decision was right or wrong I have not to determine. It was founded on other cases. Provided the testator acknowledges the paper to be his will and his signature is there at the time, it is sufficient." I dissent from the proposition of Lord Penzance, and agree with the ruling of Dr. Lushington, and therefore I hold that it is not sufficient to say "This is my will." The argument that that will do is founded on the notion that the statement by the testator "This is my will" implies that his signature is affixed to it; but that is not so, a will is not a valid will until it is attested, and there is no necessary implication that it already bears the testator's signature. It may be that the testator has not yet signed it, but may intend to do it, and it is quite possible that he may in that sense call it a will, inasmuch as it will, when executed, be a will. But I say that if he had distinctly said that he had signed the will, but yet the witnesses would not be able to see his signature, that is not a sufficient acknowledgment. Is there any doctrine to the contrary? Lord Penzance does not, to my mind, lay down any new doctrine; he thought himself bound by the decision of Sir Cresswell Cresswell in *Gwillim* v. *Gwillim*. I will now turn to that case, and with great deference to Lord Penzance, I do not think Sir C. Cresswell laid down such a doctrine. I agree people may, in reading the decision, as I am bound so to say, considering that Lord Penzance so read it, come to the same conclusion as he did, but I think that Sir C. Cresswell did not decide or intend to decide anything of the kind. In *Gwillim* v. *Gwillim*, the signature of the testator (as printed in the report) is placed immediately above the signature of the witnesses. If nothing was put upon the signature it was impossible for the witnesses to sign their names without seeing the signature if it was there, and the argument therefore turned upon the question whether the signature was there or not. The present question was not under discussion. The material part of the judgment is on page 205, "I am therefore at liberty to judge, from the circumstances of this case, whether the name of the testator was on the will at the time of the attestation or not. It is hardly likely that this testator, who knew that there must be two witnesses to the will, did not also know that he must sign it before they did, and either sign it or acknowledge it in their presence. Then if I look at the position of the words, I find at the top of the third page, 'My will and testament, 1856, March 31st.' Under that comes 'Brange, Mar. 31, 1856,' that being the time and place at which the old ladies say they were asked to sign the will. Under that comes 'John Gwillim,' and then the word 'witness' a little below on the left hand side where one would expect to find it. I cannot, therefore, but think that the name of the testator was written at that time, and that by asking these old ladies to witness his will he did acknowledge his signature."

Now that I say is *Hudson* v. *Parker*, 1 Rob. 14. The witnesses were taken to have seen the signature, and the testator having then asked them to witness his will, he was held to have acknowledged his signature.

I cannot find one word in the judgment to show that Sir C. Cresswell was of opinion that if the witnesses were unable to see the signature, the testator saying he had signed would be sufficient. I do not think the decision bears out the interpretation put upon it by Lord Penzance, namely, that there was any new doctrine laid down in that case different from the doctrine of *Hudson* v. *Parker*. The existence of any such doctrine rests entirely on the statement of Lord Penzance in *Beckett* v. *Howe;* and as I think there was no sufficient ground for that statement, I am of opinion that the case of *Beckett* v. *Howe* is no authority.

If that is so, there is only one other point, and that is, did the witnesses see the signature? I am of opinion upon the evidence that they did not. Susan Harradine says in express terms that she did not; that there was a piece of blotting-paper over the signature. I have looked carefully at the original writing, and the appearance of the document strongly confirms this statement of the witness. The words, including the signature of the testatrix, are dull and blurred as if they had been blotted, and it would appear as if the blotting-paper reached down below the signature of the testatrix. The other witness says the same thing in the first instance, and then subsequently that she sometimes thought that she did see the signature, but she could not say whether she did or not. I must upon this evidence come to the conclusion that it is most satisfactorily, or rather most unsatisfactorily, proved that these witnesses did not see the signature.

I refrain from going into the next question whether sufficient expressions were used by the testatrix as to the document being her will. If it were necessary I should take more pains to consider the meaning of the words used; but I think it is unnecessary to do so on the present occasion, having regard to the conclusion of fact that the witnesses did not see the signature of the lady, and the decision of the learned President pronouncing against the will must be affirmed.

Brett, L. J. In this case we have a document which is in form a will, leaving a large amount of property, and it is undoubted that the testatrix meant thereby to deal with her property in the manner therein pointed out, and it is equally clear that she signed the document meaning it to be her will, and equally clear that she thought she was complying with the requirements of the Statute, and that this document represents her last and final intentions as to the disposition of her property.

That being so, no one can be astonished if the court should have made every endeavor to uphold it so far as it could in accordance with law, for one must feel distressed at the result that the disposition of her property which this lady intended to make must depend upon the accident of putting a piece of blotting-paper a quarter of an inch higher or lower. But we have to consider here an enactment of a Statute, in which there is no elasticity, we are bound to say whether this particular will complied with the requirements of the Statute.

I think it did not, and our decision must be attended with the unhappy consequence that the clearly known and expressed intention of this lady with regard to her property must be set aside, and persons whom she clearly meant to benefit be deprived of all benefits under it.

The first point is what are we now, as a Court of Appeal, to assume to be the real facts of the case as shown by the evidence in the court below. If the learned President of the Probate Division had come to the conclusion from the evidence before him, and on seeing the witnesses, even if they had used the expressions which are now before us on paper, that in fact this lady did sign in the presence of these witnesses, I should not be inclined to disagree with his conclusion; or if he had found or collected from what the witnesses said, that they could not say whether the signature was or was not under the blotting-paper, and he had come to the conclusion that the signature was visible, and that what the lady said was "This is my will," I should have agreed. But I think that he must be taken to have come to the conclusion from the evidence, and the conclusion seems borne out by the appearance of the document itself, that the blotting-paper was so placed that the witnesses not only did not but could not see the signature. If then they did not and could not see the signature, did this lady say "This is my whim," or "This is my will"? I shall assume, as being against rank absurdity, that she said "This is my will." The question then raised is whether it is a compliance with the Statute, if a testatrix, when two witnesses are present for the purpose of attesting a document, should say in their presence "This document is my will," whether that is a sufficient acknowledgment if at the time the witnesses did not and could not see the signature. That is a point of law, and on this point we must give our judgment. It is a point which must be decided upon the Statute itself, and even if twenty cases decided that it would be a sufficient acknowledgment, if we were clearly of opinion that according to the true construction of the Statute it would not do, we should not be bound by those cases. Where there have been several decisions or a series of decisions upon any Statute, I should dread to overrule those decisions or that series of decisions, but still we should be compelled so to do if we thought that those decisions were not in accordance with the Statute. But in this case we have no long line of decisions one way; there seem to be conflicting decisions, and we must accordingly exercise our own judgment on the question independently almost, if not quite, of every former decision.

It is clear that *Hudson* v. *Parker* dealt exhaustively with the very point, and the opinion of Dr. Lushington was that, whatever might be the case under the older Statute, on the Statute then before him, and which is now before us, where a will has not been signed by the testatrix in the presence of two witnesses, and where it is necessary therefore to rely on an acknowledgment under the Statute, then even though the signature be there, and whatever is done be done in the presence of two witnesses together at the same time, if they do not

see or do not have the opportunity of seeing the signature, whatever the testator may say there is not an acknowledgment in the meaning of the words of the Statute. To make it such an acknowledgment they must see or have the opportunity of seeing the signature. That is the interpretation put by Dr. Lushington on the Statute, and by the course of reasoning with which I wish respectfully to express my full agreement, it seems obvious that where an acknowledgment has to be relied upon, the witnesses must see or have the opportunity of seeing the signature. When they are required to attest the signature, they must see or have the opportunity of seeing the person signing the document. The doctrine is the same where the testator has to acknowledge his signature. I must say that looking at the Statute alone, you can only get at this necessity from the meaning of "acknowledgment," not from the words "the witnesses shall attest," because it is not the signature they are to attest, but the will. The question turns on what is meant by acknowledgment.

When you find that in order to make the signature sufficient the witness must see the person sign, so when a signature is to be acknowledged they must see that there is a signature, and the testator must then in their presence say something equivalent to "That is my signature;" so that if they do not have the opportunity of seeing the signature, even if he say before them "My signature is in this instrument," that will not do. That I take to be the decision of *Hudson* v. *Parker*.

It is said that the case of *Gwillim* v. *Gwillim* before Sir C. Cresswell, and the case of *Beckett* v. *Howe* before Lord Penzance, are to the contrary. As to the latter case there is no doubt that it is — and so it has been held. It is said that Lord Penzance decided it on the authority of *Gwillim* v. *Gwillim*, and that that case does not decide what his Lordship thought it did. As regards this proposition I feel very great difficulty. There has never been, certainly not in our time, so great a master of what I would call transparently lucid exposition as Sir C. Cresswell, and therefore when I find that learned judge saying this, "I am therefore at liberty to judge from the circumstances of this case, whether the name of the testator was on the will at the time of the attestation or not," I cannot bring my mind to think that the proposition which he thought he had to solve was not this, and this only, whether the signature was or not on the will at the time of the attestation. Moreover, if there is a judge who is less likely to make a mistake as to what another judge has said, that judge is Lord Penzance; a clearer mind does not exist: and, therefore, when he comes to the conclusion that Sir C. Cresswell meant what he says he meant, it strengthens my view as to the meaning of Sir C. Cresswell in that case. Therefore we are reduced to this misfortune in arriving at the conclusion we have come to, that we are differing from both those judges. It may be said that in *Gwillim* v. *Gwillim* the point was not raised or was not argued, and the case of *Hudson* v. *Parker* was

not even cited — the argument went on another line — but I do think that Sir C. Cresswell did intend to lay down the proposition of law which Lord Penzance understood him to lay down.

But on mature consideration, all I can say is that I differ on this question from those judges, and I feel bound to say that when I do differ from two such judges, I entertain much more doubt as to the propriety of my decision than of theirs. But still it is our duty to decide to the best of our powers, and I am of opinion that, according to the true construction of this Statute, witnesses must see or have the opportunity of seeing the signature. It has been brought to this, where the witnesses cannot see, have no opportunity of seeing, the signature, it is immaterial what the testator says, there cannot be an acknowledgment; but that when the signature is there and they see or have the opportunity of seeing it, then if the testator says this is my will, or words to that effect, that is sufficient acknowledgment, although he does not say this is my signature. I therefore think that this will cannot stand.

Holker, L. J. I also regret that the court is constrained to come to a conclusion which will invalidate the will, but the court must be relentless and must judge according to law and fact, without regarding the possible consequences of the decision it feels bound to give.

The appeal has been argued on two grounds, first that the evidence was not enough to show that the testatrix did not sign her will in the presence of two witnesses; and, secondly, that if she did not she acknowledged her signature before other witnesses.

The first ground was put forward by Dr. Deane rather on the suggestion of the court. The will is, upon the face of it, in due form; the lady who made the will was properly instructed as to what she had to do; she knew that it was necessary to sign it before the witnesses, and that they should sign in her presence. The attesting clause was in proper form; it is said that all these matters being strictly correct, the maxim of law, *Omnia præsumuntur rite esse acta*, must apply. It is further said that the result should be the same, even though this finding would not be quite in accordance with the testimony of the witnesses. That might be the case if the witnesses who came forward to prove the will had been in doubt or could not remember whether they did or did not see the testatrix sign. The fact that everything appears to have been rightly done would entitle the court to come to the conclusion that they did in fact see her sign. But when you have to prove a will strictly, and if they both say, or one of them says, they did not see her sign, it is impossible to say that there is proof of due execution. Therefore, where, as here, one positively says that she did not see her sign, and the other doubts, it is clear that that kind of testimony is not sufficient to establish the validity of the will.

The other ground on which Dr. Deane relied was that there was here a sufficient acknowledgment of the signature of the testatrix to her will made to the two witnesses. Now we come upon the second ground, as

to what the cases have decided. What sort of acknowledgment is enough? According to the Statute, the signature is to be made before two witnesses, or the signature is to be acknowledged before two witnesses. For what purpose? To enable them to testify to the signature or to the acknowledgment of the signature.

It is clear that good sense requires that the acknowledgment to which the witnesses are to bear testimony should be an acknowledgment of the signature seen or capable of being seen by the witnesses. Although the words of the Statute are, "such witnesses shall attest the will" and not "the signature," it seems to me that it comes to the same thing, for when the document is properly signed or acknowledged in the presence of the witnesses, it becomes a will. So to my mind, to bear testimony to a will is the same thing as to bear testimony to the signature.

That being so, it was decided in *Hudson* v. *Parker* that the true view of the section was that, to constitute an acknowledgment sufficient within the Statute, the witnesses must see, or be able to see, the signature of the testator, and if so, there is no such acknowledgment in the present case, because, as far as the evidence goes, the signature of this testatrix was carefully concealed. Certainly both witnesses did not see the signature. But putting that difficulty out of the way, I should think it was not enough to prove that the witnesses saw the signature, but they should also know what this document which is signed really is. But the evidence goes to this, that this lady never said, "This is my will." According to Susan Harradine she said, "We have all our little wishes, and this is one of mine." According to Ann Harradine she said, "It is a little whim of mine." To my mind it is not very extraordinary that this lady, getting these two servants to attest, should not care particularly for them to know that this was her will, she might be afraid of exciting curiosity; and at any rate Ann says in her evidence that if she had said that it was her will, she would have taken more notice.

The testatrix does not say, so far as the evidence goes, that it is her will, she does not say even that her signature is under the blotting-paper, therefore even if *Hudson* v. *Parker* were out of the way, it would be a difficult thing to say that this signature was acknowledged in the presence of two witnesses. I am therefore of opinion that this decision of the President is right, and must be affirmed.

Appeal dismissed, but under the circumstances costs of all parties ordered to be paid out of the estate.

DAINTREE *v.* FASULO.

PROBATE DIVISION. 1888.

[*Reported* 13 *P. D.* 67.]

BUTT, J.[1] The first question I have to decide here is whether the will of the testatrix, Miss Mary Anne Hainworth, made on September 29, 1877, was duly executed. About this there is no contest; the parties are agreed, and the evidence of the witnesses called is sufficient to prove the due execution of the will. Having regard to all the circumstances, I have no hesitation in admitting the will to probate.

Then the material question of this case arises. The will having been made on September 29, 1877, there is a codicil materially affecting it, said to have been executed on March 18, 1886. Both documents, the will and the codicil, are informal. Both are in the handwriting of the testatrix and both are signed by her. It is clear that on the day of the attestation of the codicil, the testatrix produced it, and asked one of the two attesting witnesses, Miss Hepburn, to sign it and also to allow her servant to sign it. Miss Hepburn objected to bring her servant into the matter, and the other attesting witness, Miss Whymper, was called in or came in, and subscribed as an attesting witness. It does not appear that anything was said to either of the attesting witnesses by the testatrix to the effect that the paper in question was her will, or even that it was any sort of testamentary document. It does not appear that either of them was aware that it was a testamentary paper. Still they were asked to sign it, the first witness by the testatrix herself, and the second either by the testatrix herself or by Miss Hepburn, in her presence and hearing, which would be the same thing. They signed their names as witnesses, and it is a fact in the case that the word "witnesses" is written before the first of the two names. Was the signature of the testatrix above the attestation written there at the time they signed? Neither of the attesting witnesses has been able to say positively that they saw it there, or that it was there, but I think there can be no doubt that it was there. We have then this state of things; the signature of the testatrix was there, visible and open to the attesting witnesses, if they had looked to see it, for there was no pretence of covering it up, and though they cannot say that it was written there in their presence, a fair inference is that it had been written there before they signed. Having regard to these facts, is the will valid? It was not, to use the words of the 9th section of the Act, "made by the testatrix in the presence of the two attesting witnesses," because the signature had been put on it before. Was it, then, "acknowledged in the presence of the two attesting witnesses," to use again the words of the Act; and upon that the question arises, What is an acknowledgment? The paper was produced with

[1] Only the opinion is given.

the testatrix's signature upon it, and the witnesses were asked to subscribe as witnesses. I think that is, as I have already said, a fair inference of fact. In substance it amounts to this, — Here is a paper signed by the testatrix. They are not told what it is, they are not told that it is a will or a testamentary paper, but they are asked to sign their names as witnesses. They do so. Is that a sufficient acknowledgment of the signature being the signature of the testatrix? I hold that it is, and I should have held so apart from any authorities, but the general tenor of the authorities which have been cited supports the proposition, which I hold to be a good one. I do not think that the case of *Blake* v. *Blake*, 7 P. D. 107, is any authority to the contrary, because the whole of the observations of the learned judge there were based on the facts of the case; a leading and prominent fact of the case being that the witnesses never could and never did see the signature of the testator. *In the Goods of Thompson*, 4 Notes of Cases, 643, decided by Sir H. Jenner Fust in 1846, is an authority in favor of Mr. Inderwick's contention, as I read it; a direct authority, because there, the signature of the testator had been affixed to the document before the attesting witness saw it, and there was no statement to that attesting witness as to the nature of the document or as to the testator's signature. All that was said was "sign the paper," and it was held that the circumstances amounted to a virtual or constructive acknowledgment by the testator. In *Pearson* v. *Pearson*, L. R. 2 P. & M. 451, Lord Penzance treats that decision as practically overruled by the Privy Council in *Ilott* v. *Genge*, 4 Moore, P. C. 265, because he says, after reviewing the cases, "I have come upon *Ilott* v. *Genge*, in which Sir H. Jenner Fust repeats the same observation: 'The production of a will by a testator, it having his name upon it, and a request to the witnesses to attest it, would be a sufficient acknowledgment of the signature under the present Statute.' In that case there was an appeal to the Privy Council and their Lordships decided that even assuming a will which was signed by the deceased before the witness had been called in, the mere circumstance of calling in the witnesses to sign, without giving them any explanation of the instrument they are asked to sign, does not amount to an acknowledgment of his signature by a testator. As the case of *Ilott* v. *Genge* was decided by a Court of Appeal it has set aside any observations not in accordance with it made in *In the Goods of Thompson*."

I do not quite understand what is meant by that. I doubt whether there is any observation of Sir H. Jenner Fust in *In the Goods of Thompson* which is inconsistent with the decision in *Ilott* v. *Genge;* but if there be I cannot help thinking that Lord Penzance had lost sight of what was the leading feature in *Ilott* v. *Genge*, but which did not exist in *In the Goods of Thompson*, viz., that the witnesses were not allowed to see the testator's signature, which was covered up. That made the whole difference between the two cases. Holding *Ilott* v. *Genge* to be good law, which of course I do, there is nothing in that

case to affect the decision of Sir H. Jenner Fust. I do not agree with Lord Penzance that *In the Goods of Thompson* was overruled by *Ilott* v. *Genge*, and I consider myself at liberty to act upon it. The result is, that I shall pronounce for this codicil as well as the will, giving the costs of all parties out of the estate.

Bayford, Q. C. (*Barnard* with him), for the plaintiffs.

Inderwick, Q. C. (*Middleton* with him), *contra*.[1]

GRAHAM *v.* GRAHAM.

SUPREME COURT OF NORTH CAROLINA. 1849.

[*Reported* 10 *Ired.* 219.]

APPEAL from the Superior Court of Law of Rowan County, at the Fall Term 1848, his Honor *Judge Moore* presiding.

This is an issue, *devisavit vel non*, made up under the Statute to try the validity of a paper writing, propounded as the will of John Graham, deceased. The evidence was, that the supposed testator executed the will in the presence of two witnesses, and desired them to attest the instrument. He was lying in bed very sick at the time, and the two witnesses withdrew into another room, between which and the testator's sick chamber there was a door open, and at a large chest in that other room the witnesses signed their names. The bed, in which the deceased was lying, stood by the partition between the two rooms, and two or three feet from the door, and the chest, on which the witness subscribed the will, stood also against the other side of the partition, and nearly opposite to the bed; so that the testator, as he was lying in bed, could, by turning his head and looking around the side of the door, see the backs of the witnesses, as they sat at the chest writing, but he could not see their faces, arms, or hands, or the paper on which they wrote; a view of those being obstructed by the partition. After the signing by the witnesses, they returned with the will into the room where the testator was, and informed him they had witnessed it, and he requested a person present to take charge of it. The court directed the jury, that, though the testator could have seen enough of the persons of the witnesses, while they were subscribing the will, to enable him to recognize them, yet if he could not have seen what was going on, whilst they were in the act of attestation, the paper was not properly executed and attested. The jury found against the will, and from a judgment accordingly the executor appealed.

Boyden and *Craig*, for the plaintiff.

Clarke, for the defendant.

[1] Publication is necessary under the New Jersey and New York Statutes. *Den* d. *Compton* v. *Mitton*, 7 Halst. 70 (1830); *Lewis* v. *Lewis*, 11 N. Y. 220 (1854). And see *Matter of Mackay*, 110 N. Y. 611 (1888).

RUFFIN, C. J. The rule laid down by his Honor seems to be a very rigid construction of the terms "in his presence," which are used in the Act; but it is in conformity with the cases hitherto decided on this subject, and, we believe, with the policy and meaning of the Statute. Except in the case of a blind person, "presence" seems to have been understood as having the same sense as "within view;" and it follows, that the thing to be seen, or to be within the power of the party to see, is the very fact of subscribing by the witness. Thus in *Shires* v. *Glascock*. 1 Atk. 688, which was the first or one of the first cases that occurred in England under the Statute of Frauds, it was held that a signing in another room, some yards distant from the testator, was a subscribing in his presence, because he might see it by a broken window; the court saying, "that the Statute required attesting in the presence of the testator, to prevent obtruding another will in the place of the true one;" therefore, that when "the signing is in the view of the testator, it is enough," though he should not actually see them signing. That, we take it, is the true principle of the Statute, that a subscribing by the witness must be in such a situation, whether within or without the testator's room, as will enable the testator, if he will look, to see, that the paper signed by him is the same, which is subscribed by the witness. Therefore, when they subscribe out of the testator's room, and in such a situation that he cannot see the paper, and for that reason cannot see and know for himself, that it is the true paper, it cannot in any proper sense be said, that the thing was done in his presence. The Statute meant, that he should have evidence of his own senses to the subscribing by the witnesses, just as he should to a signing for him by another by his direction and in his presence; so as to exclude almost the possibility of imposition by substituting one paper for another, without detection by the testator himself upon his own ocular observation, and without exposing him to any risks from undue confidence. In *Doe dem. Wright* v. *Mansfield*, 1 M. & S. 294, Lord Ellenborough lays down this to be the rule; that, when the devisor cannot see "the act doing," that is out of his presence. And in the case of *Casson* v. *Dade*, 1 Bro. C. C. 99, Lord Thurlow held a will to be well executed which was attested at the window of an attorney's office, because the testatrix was sitting in her carriage and it was put back to the window of the office, so that she "might see what passed;" so it is said in the other case of *Davy* v. *Smith*, Salk. 395, that the testator might have seen the witnesses "subscribe their names" if he would, and therefore that the will was well executed. We believe, indeed, that there is no instance, in which a paper has been sustained, where the attestation was under such circumstances, that the testator could not see what was done, so as to protect himself upon his own knowledge against any dishonest substitution by the people, whom he is obliged by the law to select, and depend upon, as subscribing witnesses to his will.

PER CURIAM. *Judgment affirmed.*[1]

[1] But see *Nock* v. *Nock*, 10 Grat. 106 (1853).

CHASE *v.* KITTREDGE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1865.

[*Reported* 11 *Allen*, 49.]

APPEAL from a decree of the Judge of Probate, allowing an instrument as the will of Simeon Daniels.

At the trial in this court, before *Gray*, J., one of the issues to the jury was as to the execution of the will. Joseph A. Sprague, one of the attesting witnesses, testified as follows:

"Mr. Daniels came into my office and told me how to draw his will. I made a rough sketch of a will and read it to him, and he said it was all right, and went out. I copied it, and he came back and sat down by my side. I read the will down to the seal, and said, 'Does that suit you?' He said it did. I then read the witness clause and my name, and said, 'Mr. Daniels, I have written my name as a witness to your will.' After talking with him some time I went and called two other witnesses, Holden R. Greene and Carlton Cushman. When they came in they stood around the table. I said, 'This is Mr. Daniels's last will and testament;' and he bowed assent. He took the pen and wrote his name opposite the seal. I either repeated or read the witness clause to the other two witnesses. Then, pointing to my signature, I said to Cushman or Greene, 'Sign your name under mine, where I have signed as a witness.' Cushman signed his name, and Greene signed his name, and they did not stay a moment. Mr. Daniels remained after they went out. We three were all present when he signed his name. We were all close together, and he could see where I pointed for the other witnesses to sign. The will was in full view." On cross-examination this witness stated, "I put on the seal and my name while he was gone. I did not rewrite or retrace my name after he signed his."

The heirs at law objected that the facts stated by this witness would not warrant a verdict or decree establishing the will; and the case was thereupon reserved for the determination of the whole court.

E. Mellen, for the appellants.

P. E. Aldrich, for the appellee.

GRAY, J. This case presents an important question of construction of the Statute of Wills, upon which there has been much apparent, and some real, conflict of judicial opinion, and in the consideration of which it is essential to keep in mind the exact language of the enactments under which cases have arisen.

By the original English Statute for the prevention of frauds and perjuries, passed in 1676, it was enacted that "all devises and bequests of any lands or tenements shall be in writing, and signed by the party

so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed, in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect." St. 29 Car. II. *c.* 3, § 5. That Act did not extend to the Colony of Massachusetts, which had been previously settled, and was not named therein. 2 P. W. 75; St. 25 Geo. II. *c.* 6, § 10. But the provision was re-enacted here in the same words in the first year after the Province Charter; and again in 1783, substituting only the words "three or more" for "three or four" witnesses. Prov. St. 4 W. & M. (ed. 1726), *c.* 3, § 3, p. 5; Anc. Chart. 234. St. 1783, *c.* 24, § 2. It was retained, and extended to personal estate, in 1836, in this form: "No will" (excepting nuncupative wills) "shall be effectual to pass any estate, whether real or personal, nor to charge or in any way affect the same, unless it be in writing, and signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed, in the presence of the testator, by three or more competent witnesses." Rev. Sts. *c.* 62, § 6. And the words just quoted have been incorporated, with trifling variations, into the General Statutes, *c.* 92, § 6.

This provision, it will be observed, does not expressly require that the testator should sign in the presence of the witnesses; nor that the witnesses should subscribe in the presence of each other, nor even that they should know that the instrument is a will. Courts will not require formalities which the Statutes do not. It is accordingly the well-settled construction, both in England and in this Commonwealth, that it is sufficient for the testator, in any form of words, to acknowledge or recognize his signature in the presence of the witnesses, either together or separately, with no attestation clause beyond the single word "witness," and without their knowing what the instrument is. The authorities upon these points are collected in the elaborate judgment of Mr. Justice Dewey in *Ela* v. *Edwards*, 16 Gray, 91. It is equally well settled that when the attesting witnesses are dead or out of the State, proof of their handwriting is sufficient evidence that the Statute has been complied with. *Nickerson* v. *Buck*, 12 Cush. 344. *Ela* v. *Edwards*, just cited.

The positive requirements of the Statute have always been reasonably construed by the courts so as not needlessly to embarrass compliance with them in making any will, or proof of such compliance upon the offer of the will for probate. It has long been held that evidence that a witness was in such a position that he and the testator might have seen one another will authorize the inference that he was in the presence of the testator and sufficiently near to attest his signature. And the signature of the testator, if affixed in good faith for the purpose of executing his will, need not be in any particular form; a man who cannot write his own name is not to be deprived of the right to make his will; and courts will not go into nice questions of the degree of the testator's education or his physical strength to sign his name in full, but will hold a mark sufficient in any case. *Baker* v. *Dening*, 8 Ad. & El. 94; s. c.

nom. Taylor v. *Dening*, 3 Nev. & P. 228. *Nickerson* v. *Buck*, 12 Cush. 344.

The question now before us is of the meaning of that clause of the Statute which requires the witnesses to "attest and subscribe" the will "in the presence of the testator."

The only case under the St. of 29 Car. II., which we have seen, in which it was even contended by counsel that an acknowledgment by a witness, in the presence of the testator, of a signature made in his absence, was equivalent to a subscription in his presence, arose only six years after the passage of the Statute; and the point does not appear to have been then decided. *Risley* v. *Temple*, Skin. 107. But the difference in the two clauses of the Statute, the one not requiring the testator to sign in the presence of the witnesses, while the other expressly required the witnesses to subscribe in the presence of the testator, soon came to be recognized, and does not appear to have been afterwards lost sight of. *Hoil* v. *Clark*, 3 Mod. 219, 220. *Lee* v. *Libb*, 1 Show. R. 69. *Dormer* v. *Thurland*, 2 P. W. 510. *Stonehouse* v. *Evelyn*, 3 P. W. 254. Bac. Ab. Wills, D, 2. 2 Bl. Com. 377. 1 Browne's Civ. & Adm. Law, *c.* 10, *note* 27. 1 Roberts on Wills (Amer. ed.), 131. Floyer's Proctor's Practice, 127. The Statute of Frauds, while it required a will to be "attested and subscribed in the presence of the devisor by three or four credible witnesses," required a revocation to be by a written will, "or other writing of the devisor, signed in the presence of three or four witnesses." St. 29 Car. II. *c.* 3, §§ 5, 6. The Court of King's Bench in 1689 were of opinion that a will, to revoke a former will, must be "signed and subscribed" by the witnesses in the presence of the testator. *Eccleston* v. *Speke*, Carth. 81; s. c. Comb. 158. And Lord Chancellor Cowper was of the same opinion. *Onions* v. *Tyrer*, 1 P. W. 344. Lord Hardwicke, Chief Justice Willes, Chief Baron Parker, and Sir John Strange, M. R., when holding, in accordance with earlier and later decisions, that a testator's acknowledgment of his signature before the witnesses was a sufficient signing by him, even of a will revoking an earlier one, and that the words "signed in the presence of three or four witnesses," in the section concerning revocations, were limited to the last antecedent, "other writing," clearly implied that those words would not be satisfied by acknowledging a signature, instead of actually signing in the presence of the witnesses. *Ellis* v. *Smith*, 1 Ves. Jr. 10; s. c. 1 Dick. 225. And see 1 Jarman on Wills (4th Amer. ed.) 153. The English cases in which it has been held that the witnesses to a will are not required by § 5 of St. 29 Car. II. to recite on the paper that they subscribe their names in the presence of the testator, declare that they must actually so sign in his presence. Thus the Court of Common Bench in 1735, as reported by Lord Chief Baron Comyns, said, "The witnesses, by the Statute of Frauds, ought to set their names as witnesses in the presence of the testatrix." *Hands* v. *James*. Com. R. 532. And in a later case Lord Eldon said in the House of Lords, "Your lordships know

that it is necessary that the three witnesses should sign in the presence of the testator." "If it is proved that they did actually sign in the presence of the testator, the not recording that circumstance will not vitiate the will." *Rancliffe* v. *Parkyns*, 6 Dow, 202.

A new Statute of Wills was passed in England in 1837, requiring that the signature of a testator to a will, either of real or personal estate, shall be made or acknowledged by him "in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator." St. 1 Vict. c. 26, § 9. The decisions under this Statute are uniform that one witness does not "attest and subscribe in the presence of" another unless he actually affixes his signature in the presence of the other; and these decisions bear directly upon the construction of the same words in the English St. of 29 Car. II. and in our own Statutes, requiring the will to be "attested and subscribed in the presence of" the testator by the witnesses. The point was adjudged in the prerogative court of Canterbury by Sir Herbert Jenner Fust in several cases, the last of which, decided after full argument, and recognizing that "this case must form a leading case of its class," was strikingly analogous to the present. There the testator signed a codicil in the presence of one witness only, who at his request attested and subscribed it. Afterwards another witness, at the testator's request and in his presence, also attested and subscribed it, the first witness first pointing to her signature and saying, "There is my signature, and you had better place yours underneath." *Re Allen*, 2 Curt. Eccl. 331. *Re Simmonds*, 1 Notes of Cas. 409; s. c. 3 Curt. Eccl. 79. *Moore* v. *King*, 3 Curt. Eccl. 243; s. c. 2 Notes of Cas. 45. In a subsequent case the same able judge said of the witnesses, "No authority is given to them, as in the instance of the testator, to *acknowledge* their signatures previously written. The witnesses are to *subscribe*, in other words, they are required, I conceive, to do some act which shall be apparent on the face of the will. To pass over a signature, previously made, with a dry pen amounts, I think, to no more than an acknowledgment of a signature, which in the case of a witness has already been held not to be sufficient. *Moore* v. *King*. Saying and doing are not the same thing." And he therefore held that upon the re-execution of a will an attesting witness did not "subscribe" by tracing over his signature with a dry pen, "as nothing in fact was written." *Playne* v. *Scriven*, 1 Rob. Eccl. 775; s. c. 7 Notes of Cas. 122. He also decided that it was not an attestation and subscription for a witness to add his residence after his name already subscribed on a previous day. *Re Trevanion*, 2 Rob. Eccl. 311.

Other decisions of Sir Herbert Jenner Fust are directly to the point that a signature by the testator after the witnesses have signed is insufficient, even if he has previously read the whole will to them, or they add seals to their names after he signs. In the first of these cases, the judge significantly asked, "Is the paper a will before it is signed by the testator?" *Re Olding*, 2 Curt. Eccl. 865. *Re Byrd*, 3 Curt. Eccl.

117. In a later case, which was fully argued, he reaffirmed the rule, and gave his reasons more at length, saying, "The words of the section are very precise, and I think it would be attended with dangerous consequences, if the court were to hold a will valid which has been signed in the presence of two witnesses, who have attested it before the signature of the testator was affixed to the will; for where is the court to draw the line? Suppose the witnesses attested one hour before the testator signed, or a day, or a week, or any other time; where is the court to stop if it gave a latitude of construction to this section of the Act? Suppose it were one month, or six months, or a twelvemonth, after the testator had signed the will; and whether it be at the time of the transaction or some time before makes no difference." *Cooper* v. *Bockett*, 3 Curt. Eccl. 659, 660. Dr. Lushington, sitting in the same court, held it to be a fatal objection to the validity of a will, that "there is no proof that the signature was affixed prior to the subscription of the witnesses." *Hudson* v. *Parker*, 1 Rob. Eccl. 39. And Sir John Dodson made a similar decision in *Shaw* v. *Neville*, 1 Jur. N. S. 408.

The law is stated in the same way, without criticism or dissent, by Lord St. Leonards, in his Essay on the Real Property Statutes, 332, 336; and in his Handybook of Property Law, Letter XIX. And the decisions of Sir Herbert Jenner Fust have been approved and followed by Sir Cresswell Cresswell in the new English Court of Probate and Divorce. *Charlton* v. *Hindmarsh*, 1 Swab. & Tristr. 433. *Re Cunningham*, 29 Law Journal N. S. Prob. 71. *Re Hoskins*, 32 Law Journal N. S. Prob. 158.

In *Charlton* v. *Hindmarsh*, *ubi supra*, one witness, Frederick Wilson, signed his name in the testator's presence and at his request in the morning, omitting to cross the *F* in his signature. In the afternoon of the same day another witness attested and subscribed the will in the presence and at the request of the testator; and the first witness, as he testified, then acknowledged his signature to the second by saying that his name was there already, crossed the *F*, merely in pursuance of his habit of supplying the omission when he noticed it, and added the date, thinking that equal to a repetition of the signature, and with the object of making his signature of the morning a complete signature. From the decision of the judge ordinary against the will an appeal was taken to the House of Lords, who, by the concurrent opinions of Lords Campbell, Cranworth, and Chelmsford, unanimously affirmed the judgment. *Hindmarsh* v. *Charlton*, 8 H. L. Cas. 160. The reasons for the decision are best stated by Lord Cranworth, thus. [Here followed quotations from Lord Cranworth's opinion, which is given, pp. 266, 267.]

We have been led to make a full collection and statement of the English authorities upon this point, because they have been said by those taking a different view of the law to be few in number and ill considered. An English case or two from which some assistance

has been sought by way of analogy to support this will remain to be noticed.

The Court of Queen's Bench in *Roberts* v. *Phillips*, 4 El. & Bl. 450, held that the subscription of the witnesses need not be below the signature of the testator or the end of the will. And there is an early ruling of Lord Chief Justice Trevor to the same effect. *Peate* v. *Ougly*, Com. R. 197. But in each of those cases there was direct or circumstantial evidence that the names of the witnesses were signed after the testator's signature and in his presence; there is no intimation by the court that any presumption of a valid execution would arise, even after the death of the witnesses, from subscriptions so placed; and Lord Campbell, who delivered the opinion in *Roberts* v. *Phillips*, afterwards concurred in the judgment of the House of Lords in *Hindmarsh* v. *Charlton*, above cited. The decision in *Roberts* v. *Phillips* went no farther than to allow an attestation, apparently insufficient, to be made good by evidence that the requisites of the Statute had been actually complied with. But if the signature of a witness, made before that of the testator, is allowed to be sufficient upon proof of a later acknowledgment by the witness in the testator's presence, then the witnesses may subscribe an instrument not yet signed by the testator and in his absence, with the honest intention of acknowledging their subscriptions to him after he shall have signed; his name may be signed at any time afterwards, without any witness to observe and testify whether it is affixed by him or by his authority or not, and, if it is, whether he is sane or insane; and the previous subscription of the witnesses be held after his death to be evidence of a due execution and attestation, when in fact his name is forged, or at least there has been no subscription or acknowledgment by the witnesses in his presence, and so, on the loosest interpretation, no compliance with the Statute.

Reference has also been made to the rule that a witness may subscribe by a mark as well as by writing his name in full. This is now well settled both in England and in the United States. 1 Jarman on Wills (4th Amer. ed.), 73, and Amer. note. The counsel for the appellee asked, "If a witness may adopt what is made by another, cannot he adopt what is made by himself?" But the mark is not made by another, but by the witness himself, and has never, so far as we are informed, been held sufficient unless affixed in the presence of the testator. Even a signature of a witness's own name when his hand is guided by another person is held sufficient in England only because the witness has some share in the writing. *Re Mead*, 1 Notes of Cas. 456. *Re White*, 2 Notes of Cas. 461. *Harrison* v. *Elvin*, 3 Q. B. 117. *Lewis* v. *Lewis*, 2 Swab. & Tristr. 153. And we have seen no American decision which goes farther, except that of the surrogate in *Campbell* v. *Logan*, 2 Bradf. 90. A subscription of the name or mark of a witness by another person in the presence of himself and the testator might possibly be a literal compliance with the Statute, but, not being in the handwriting of the witness, would create no presumption of a lawful

execution and attestation, without affirmative evidence that it was so made. In the case referred to in 3 Dane Ab. 452, in which this court held the mark of a witness a sufficient subscription, the record shows that the will of Stephen Needham was admitted to probate upon the testimony of the three witnesses to a compliance with all the Statute requirements, and, among others, "that they and each of them in the presence of the said Stephen and at his request and in the presence of each other subscribed the said instrument, namely," two of them "severally wrote their names at full length upon the said instrument," and the third "made a mark thereto, upon and near which and with her consent the said Stephen wrote her name at full length." *Needham* v. *Needham*, Essex, November Term, 1802.

There is no direct decision in this Commonwealth upon the question whether the subscription of a witness to an instrument yet unsigned by the testator and in his absence may be made good by afterwards acknowledging it in his presence. Certainly no careful attorney or scrivener would advise or permit such an attestation and subscription. And many expressions in our books tend to show that it would be invalid. Mr. Dane recognizes the doctrine that if the testator owns his signature to the witnesses, it is sufficient, but assumes that the witnesses must subscribe in his presence. 4 Dane Ab. 562, 563. In *Laughton* v. *Atkins*, 1 Pick. 543, 544, Chief Justice Parker, quoting *Eccleston* v. *Speke*, above cited, said that to comply with the Statute of Frauds, a will must be "signed and subscribed by the witnesses in the presence of the testator." The commissioners on the Revised Statutes, in recommending that the formalities required for a will should also be required for an instrument of revocation (as the Legislature accordingly did in the Rev. Sts. c. 62, § 6), remark that our Statute of 1783, like the St. of 29 Car. II., from which it was copied, made this difference between the two, which they italicize as follows: "The former must be attested and subscribed by three or more witnesses *in the presence of the testator;* but it is not required that *he* should sign it *in their presence;* whilst an instrument revoking a will must be signed by the testator *in the presence of three or more witnesses*, but it is not required that *they* should subscribe it in *his* presence, nor indeed that they should subscribe it at all." In *Dewey* v. *Dewey*, 1 Met. 354, Mr. Justice Dewey said, "It can hardly be supposed that the testator, who was by his own active agency procuring the authentication of the instrument by the requisite witnesses, would have omitted the first step necessary to its due execution, viz. the signature by himself." These words are quoted with approval in *Ela* v. *Edwards*, above cited. In *Boldry* v. *Parris*, 2 Cush. 433, the questions whether a witness might sign before the testator, and whether an acknowledgment by a witness in the presence of the testator was equivalent to a subscription, were raised by counsel, but not noticed in the opinion, because there was no evidence that one of the witnesses so much as acknowledged his signature in the testator's presence.

The Supreme Court of Vermont, under a Statute exactly like our own, except in requiring the witnesses to attest and subscribe in the presence of each other as well as of the testator, has indeed held, with the courts of England and of Massachusetts, that an acknowledgment by the testator of his signature in the presence of the witnesses is sufficient. *Adams* v. *Field*, 21 Verm. 256. But the same court has held that an acknowledgment by one witness, in the presence of the others and of the testator, of a signature made in the absence of one of them, is not a subscription in their presence. *Pope* v. *Pope*, 38 Verm.

The Supreme Court of New York, under the provisions of the English St. of 29 Car. II., assumed it to be necessary that the witnesses should subscribe in the presence of the testator, and inferred the fact of their having so subscribed from their signatures to an ancient will, although not stated in the attestation clause. *Jackson* v. *Christman*, 4 Wend. 282. And in *Peck* v. *Cary*, 27 N. Y. 31, 32, Chief-Justice Denio quoted as entitled to great weight the opinions of Sir Herbert Jenner Fust in *Cooper* v. *Bockett*, above cited, and other cases. The decisions cited by the appellee from Bradford's Surrogate Reports were made under a Statute which required each attesting witness to "sign his name as a witness, at the end of the will, at the request of the testator," but omitted the requirement of earlier Statutes that the witness should sign in the testator's presence. Rev. Sts. of N. Y. (3d ed.) pt. 2, c. 6, § 32. 4 Kent Com. (6th ed.) 515. *Rudder* v. *McDonald*, 1 Bradf. 352. *Vaughan* v. *Burford*, 3 Bradf. 78. *Hoysradt* v. *Kingman*, 22 N. Y. 372. The Statute of Illinois under which the case of *Vaughan* v. *Vaughan*, 13 Amer. Law Reg. 735, arose, had a similar omission, and only required the will to be "attested in the presence of the testator by two or more credible witnesses." Comp. Sts. of Illinois of 1856, c. 110, § 1. And these decisions were but of single judges in County Courts of Probate.

The case of *Miller* v. *McNeill*, 35 Penn. State R. 217, to which the appellee has referred, arose under the Pennsylvania Statute of 1833, providing that "every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof or by some person in his presence and by his express direction, and in all cases shall be proved by the oaths or affirmation of two competent witnesses." By that Statute, as by the previous law of Pennsylvania from very early times, the witnesses need not subscribe at all, even to a will of real estate. *Hight* v. *Wilson*, 1 Dall. 94. *Rohrer* v. *Stehman*, 1 Watts, 463. In Delaware, under a Statute like ours, it was held that the witnesses must sign in the presence of the testator, and the distinction between such a Statute and that of Pennsylvania was pointed out by Chief-Justice Clayton. *Rash* v. *Purnel*, 2 Harring. 458. *Pennel* v. *Weyant*, Ib. 506.

In New Jersey, under a Statute in terms requiring wills to be "signed by the testator in the presence of the subscribing witnesses," an

acknowledgment of his signature is held insufficient. *Den* v. *Mitton*, 7 Halst. 70. *Combs* v. *Jolly*, 2 Green Ch. 625. *Mickle* v. *Matlack*, 2 Harrison, 86. And in the last case Chief-Justice Hornblower, who dissented on this point, as well as Mr. Justice Dayton, who concurred with the majority of the court, thought that the witnesses must sign in the presence of the testator. 2 Harrison, 96, 116.

The Supreme Court of North Carolina, under a Statute like ours of 1783, have held in at least three cases, the facts of two of which were singularly like those now before us, that a will could not be established unless the witnesses actually set their names in the testator's presence, and that, as said in the earliest case, "it was the intention of the Legislature that the heirs at law should not be disinherited but by a strict compliance with the words of the Act, and that the door to fraud should be completely shut." *Ragland* v. *Huntingdon*, 1 Ired. 561. *Graham* v. *Graham*, 10 Ired. 269. *In re Cox's Will*, 1 Jones, 321.

In Connecticut and Kentucky it has indeed been held, under Statutes not unlike our own, that a witness might sign in the presence of the testator before he signed, and acknowledge it afterwards. *O'Brien* v. *Galagher*, 25 Conn. 229.[1] *Swift* v. *Wiley*, 1 B. Monr. 117, approved in *Upchurch* v. *Upchurch*, 16 B. Monr. 113.[2] But the only decisions, which have come to our notice, in which an acknowledgment by a witness to a will in the testator's presence, of a signature affixed in his absence, has been held to be an attestation and subscription in his presence, are those of a bare majority of the Court of Appeals of Virginia in *Sturdivant* v. *Birchett*, 10 Grat. 67, and *Parramore* v. *Taylor*, 11 Grat. 220. We have not overlooked the similar opinion expressed by Mr. Redfield in his learned Treatise on Wills, 230, 247, and in 13 Amer. Law Reg. 741.

This analysis of the cases shows that by the preponderance of American authority, as by the uniform current of the English decisions, an express requirement of Statute that one person shall sign or subscribe in the presence of another is not complied with by signing in his absence and merely acknowledging in his presence. And upon full consideration we are satisfied that in this, as in most other legal matters, reason and principle are on the side of authority and precedent.

The Statute requires that the will shall "be in writing and signed by the testator," and shall be "attested and subscribed, in the presence of the testator, by three or more competent witnesses." He is not required to write his signature in their presence, but it is his will which they are to attest and subscribe. It must be his will in writing, though he need not declare it to be such. It must therefore be signed by him before it can be attested by the witnesses. He must either sign in their presence, or acknowledge his signature to them, before they can attest it. The Statute not only requires them to attest, but to subscribe. It

[1] See also *Mundy* v. *Mundy*, 2 M'Cart. 290 (1858). — ED.

[2] It was also held in *Upchurch* v. *Upchurch*, that a witness's name may be written by another person. — ED.

is not sufficient for the witnesses to be called upon to witness the testator's signature, or to stand by while he makes or acknowledges it, and be prepared to testify afterwards to his sanity and due execution of the instrument, but they must subscribe. This subscription is the evidence of their previous attestation, and to preserve the proof of that attestation in case of their death or absence when after the testator's death the will shall be presented for probate. It is as difficult to see how they can subscribe in proof of their attestation before they have attested, as it is to see how they can attest before the signature of the testator has made it his written will. The manifest intention of the Statute is that, 1st, the will should be put in writing and signed by the testator; 2d, his will so written be attested by the witnesses; and 3d, the witnesses subscribe in his presence in evidence of their attestation to his written will. There is less reason for requiring the testator to sign in the presence of the witnesses, than for requiring them to sign in his presence. A testator may alter his will as he pleases at any time before it is formally attested. He may write it out in full and sign it, and it has no effect as a will until duly attested. It is unimportant whether it is or is not signed by the testator until it is produced to the witnesses. It is only important that it should be his will in writing and signed, when they attest and subscribe it; and it is equally his will in writing, whether signed in their presence or at some previous time. It is the will of the testator, not of the witnesses. He must know its contents, but they need not. He has the contents, as well as his signature, by which to know that it is the instrument declaring his last wishes in respect to his estate. They need see nothing but his signature and their own. To allow them to acknowledge in his presence their names signed in his absence would open a door to mistake and fraud. If the witnesses might subscribe before they had attested his signature, and even before he had signed, of what weight could their subscription be as evidence, after their death, that the will had been duly signed and attested? But the controlling consideration is, that the Statute in terms requires not only that the witnesses shall attest his will, but that they shall subscribe in his presence. The distinction in this respect between the signature of the testator and the subscription of the witnesses has existed in the Statute law both of England and of Massachusetts for nearly two centuries, and been preserved in repeated enactments when other clauses have been altered. The court cannot presume so constant a difference in language to have been unintentional, or disregard it as immaterial.

As it appears by the testimony stated in the report that one of the attesting witnesses subscribed his name before the testator signed, and in his absence, the instrument offered for probate should have been disallowed.

Decree of the Judge of Probate reversed.

RIGGS *v.* RIGGS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1883.

[*Reported* 135 *Mass.* 238.]

APPEAL from a decree of the Probate Court disallowing the will and codicil of Jackson Riggs. The case was heard before *C. Allen*, J., on the issues whether the witnesses to the will and codicil, or to either of them, attested and subscribed the same in the presence of the testator, within the meaning of the Statute. The will was executed on November 15, 1881, and the codicil, which confirmed the will except in one particular, was executed on December 8, 1881. The judge ordered a decree to be entered that the will and codicil be admitted to probate, and the case remitted to the Probate Court for further proceedings. The contestant appealed; and the judge reported the case for the determination of the full court, in substance as follows: —

The witnesses to the will saw the testator sign it, and were in the room with him at the time; and they signed it as witnesses in the room adjoining that in which the testator was, and at a distance of about nine feet from him, the door being open. The testator was in bed, and in such a position that, if he had been able to turn his head round, he might, by so turning it, have seen the witnesses when they signed their names, and also the will itself, unless during a part of the time, when their bodies obstructed the view; but, from the effect of an injury which he had received, he could not, in point of fact, turn his head sufficiently to see them and the will at the time when they were signing their names as witnesses.

The witnesses to the codicil did not see the testator sign it, but he acknowledged it to be his signature in their presence, and they signed the codicil as witnesses in the same room with him, and within four feet of his head, and at a table which stood near the head of his bed, and on one side, and a little farther back than directly opposite to his head. By turning his head, if he had been able to do so, he could have seen them when they signed their names, and also the codicil itself; but, in point of fact, from the effect of said injury, he was not able to turn his head sufficiently to see them or the codicil at the time when they were signing their names as witnesses.

After the witnesses had signed their names to the original will, it was handed to the testator as he was lying upon the bed, and he read their names as signed, and said he was glad it was done. At the times when the witnesses signed their names to both will and codicil, the testator was conscious, and could hear all that was said, and knew and understood all that was done.

Upon the evidence, there was no reason to suspect any fraud upon the testator in respect to the execution or attestation of the will, or

any undue influence upon him; and it was conceded that he was of sufficient mental capacity.

L. Cowan, for the contestant.

I. W. Richardson, in support of the will, was not called upon.

MORTON, C. J. The only question presented by this report is as to the sufficiency of the attestation by the witnesses to the will and codicil of the testator.

The Statutes provide that, in order to be valid, a will or codicil must be signed by the testator, or by some person in his presence and by his direction, "and attested and subscribed in his presence by three or more competent witnesses." Gen. Sts. *c.* 92, § 6. Pub. Sts. *c.* 127, § 1.

It appeared at the hearing that the testator had received a severe injury, and was lying upon his bed unable to move. His sight was unimpaired, but he could only look upward, as he was incapable of turning his head so as to see what took place at his side. As to the codicil, it appeared that it was attested and subscribed by the three witnesses in the same room with the testator, at a table by the side of the bed about four feet from his head. The contestant contends that this attestation was insufficient, because the testator did not and could not see the witnesses subscribe their names. It has been held by some courts, upon the construction of similar Statutes, that such an attestation is not sufficient. See *Aikin* v. *Weckerly*, 19 Mich. 482, 505. *Downie's Will*, 42 Wis. 66. *Tribe* v. *Tribe*, 13 Jur. 793. *Jones* v. *Tuck*, 3 Jones (N. C.) 202. *Graham* v. *Graham*, 10 Ired. 219. But we are of opinion that so nice and narrow a construction is not required by the letter, and would defeat the spirit, of our Statute.

It is true that it is stated, in many cases, that witnesses are not in the presence of a testator unless they are within his sight; but these statements are made with reference to testators who can see. As most men can see, vision is the usual and safest test of presence, but it is not the only test. A man may take note of the presence of another by the other senses, as hearing or touch. Certainly, if two blind men are in the same room, talking together, they are in each other's presence. If two men are in the same room, conversing together, and either or both bandage or close their eyes, they do not cease to be in each other's presence.

In England, where the tendency of the courts has been to construe the Statute with great strictness, it has always been held that a blind man can make a valid will, although of course he cannot see, if he is sensible of the presence of the witnesses through the other senses. *Piercy's Goods*, 1 Rob. Ecc. 278. *Fincham* v. *Edwards*, 3 Curt. Ecc. 63. It would be against the spirit of our Statutes to hold that, because a man is blind, or because he is obliged to keep his eyes bandaged, or because, by an injury, he is prevented from using his sight, he is deprived of the right to make a will.

The Statute does not make the test of the validity of a will to be

that the testator must see the witnesses subscribe their names; they must subscribe "in his presence;" but in cases where he has lost or cannot use his sense of sight, if his mind and hearing are not affected, if he is sensible of what is being done, if the witnesses subscribe in the same room, or in such close proximity as to be within the line of vision of one in his position who could see, and within his hearing, they subscribe in his presence; and the will, if otherwise duly executed, is valid. In a case like the one before us, there is much less liability to deception or imposition than there would be in the case of a blind man, because the testator, by holding the will before his eyes, could determine by sight that the will subscribed by the witnesses was the same will executed by him. We are of opinion, therefore, that the codicil was duly attested by the witnesses.

The facts in regard to the attestation of the original will do not materially differ from those as to the codicil. The witnesses signed the will at a table nine feet distant from the testator, which was not in the same room, but near the door in an adjoining room. The door was open, and the table was within the line of vision of the testator, if he had been able to look, and the witnesses were within his hearing. The testator could hear all that was said, and knew and understood all that was done; and, after the witnesses had signed it, and as a part of the *res gestæ*, it was handed to the testator, and he read their names as signed, and said he was glad it was done. For the reasons before stated, we are of opinion that this was an attestation in his presence, and was sufficient.

The result is, that the decree of the justice who heard the case, admitting the will and codicil to probate, must be affirmed.

Decree affirmed.

SECTION II.

REVOCATION OF WILLS.

A. *Revocation by Subsequent Instrument.*

BROOK *v.* WARDE.

NISI PRIUS. 1572.

[*Reported Dyer*, 310 *b.*]

ONE Kyete, of Kent, by his will in writing, devised his land of gavelkind to one Harrison in fee; and five days before his death he revoked his will in this point, by parol only, in the presence of three witnesses, requiring their testimony of his present revocation; and said to them further, that he would alter this in his written will when he came to town, &c., and before his coming thither he was murdered by the said

Harrison. And Harrison caused the will in writing, as it was at first, to be proved; and by color thereof entered into the devise, and then was attainted of murder, and hanged: and his son entered by the law of gavelkind, *s.* "The father to the bough, the son to the plough." This matter came out in evidence to a jury of Kent this term, in *ejectione firmæ* between *Brooke and Warde;* and this manner of revocation by parol as above was affirmed for sufficient revocation at bar and bench, although it was not in writing, nor the first will in that point cancelled or defaced; *vide bene.*[1]

HITCHINS *v.* BASSET.

King's Bench. 1688. House of Lords. 1693.

[*Reported* 2 *Salk.* 592.]

In ejectment, the jury found a special verdict: That Sir H. Killigrew being seised in fee, made his will, and devised his lands to B. for life, remainder to C. in fee; they find likewise that Sir H. Killigrew made *aliud testamentum* in writing; but what were the contents of that will they do not know: The question was, if the first will was revoked? *Finch* argued, that every later will is not a revocation, for a man by one will may dispose of one acre, and by another will of another acre: So if a man purchase lands after he has made his will, he need not make his will over again, but make another will as to these. *Vide* Cro. Car. 293. Therefore this other will might be of other lands, and no revocation, and the *aliud testamentum* might be no revocation, but might be consistent. Cro. Eliz. 721; Cro. Car. 24. *Levinz*, contra, argued, that revocations are favored, because they are in the nature of restitution to the heir, and all restitutions are favored. *Vide* Dyer, 310; Moor. 429; 1 Roll. 614. A deed of feoffment without livery, a bargain and sale without enrolment, a grant of a reversion without attornment will revoke a will, and yet these are void acts; but the reason is, that it appears now it was not the testator's intent that it should remain his will, the first will must be supposed to be perfect and include all; and if a man claims by devise, he must in pleading say, that the testator by his last will devised, &c. 44 Ass. 36; 2 Ric. 2, 3 *b.* But the Court were of opinion, that it was no revocation, and the *aliud testamentum* might concern other lands, or no lands at all, or be a confirmation of the former: And the judgment was afterwards affirmed in the House of Lords. *Vide* Hard. 374; Parl. Cases, 146.[2]

[1] See *Card* v. *Grinman*, 5 Conn. 164 (1823).

[2] Followed by *Harwood* v. *Goodright*, 2 Cowp. 87 (1775); and extended to a will of personalty, where the contents of the later lost will were unknown, save that it began, "This is the last will and testament." *Cutto* v. *Gilbert*, 9 Moore, P. C. 131 (1854). See also *Hellier* v. *Hellier*, 9 P. D. 237 (1884).

WALCOTT *v.* OCHTERLONY.

PREROGATIVE COURT OF CANTERBURY. 1837.

[*Reported* 1 *Curt.* 580.]

SIR HERBERT JENNER.[1] Charlotte Anne Montgomerie Ochterlony, the deceased in this case, died at Edinburgh, on the 9th of June, 1835, of the age of twenty-three years, leaving an only brother, Sir Charles Metcalf Ochterlony, Baronet, her only next of kin. On the 30th of April, 1834, the deceased, when in London, with her own hand made her will, of which she appointed James George, John Edward Walcott, and John Ross executors. This will was deposited with Mr. George for safe custody; and the question is, Whether, under the circumstances of this case, that will is revoked? In November, 1834, the deceased went to lodge at the house of a Mrs. Bogle, in Edinburgh, where she continued until her death. In April, 1835, it appears that she was attacked with a disease of the heart, of which she ultimately died; and her medical attendants directed that she should not be suffered to write or read, or attend to business, in order that she might not be agitated.

In the beginning of May, 1835, Mrs. Bogle, by the deceased's desire, wrote to Captain Walcott's wife at Bath requesting her to get her husband to write to Mr. George, directing him to destroy the deceased's will. Captain Walcott accordingly wrote to Mr. George, but he declined to destroy the will, but sent it to Captain Walcott that he might, if he thought proper, destroy it or forward it to Miss Ochterlony. Captain Walcott, it appears, on the 10th of June, enclosed the will in a letter to the deceased, which he forwarded by a lady who was going from Bath to Edinburgh, but the deceased died before the will arrived. It appears that up to the time of her death, the deceased expressed her anxiety that the will should be destroyed, and stated to Mrs. Bogle that she would make a new will in order to revoke the former, but that Mrs. Bogle dissuaded her from so doing, informing her that as the will would be destroyed it was unnecessary to make a new one.

It is proved by Mrs. Bogle, that the letters were written by the deceased's direction, and that the passages relating to the destruction of the will were read over to and approved of by her. Now, although looking at the contents of the will, there was no reason to suppose that the deceased would depart from it; yet improbability must give way to facts, and there is no ground to suspect that Mrs. Bogle, who was ignorant of the contents of the will, had any interest or bias in respect to it.

[1] Only the opnion is here given.

The first question, therefore, on the facts she deposed to is, What was the intention of the deceased? There could be no doubt of her *animus revocandi*, and having established this point, what does the law require to give effect to such intention?

The Statute of Frauds provides that no will in writing of personal estate shall be repealed, nor any clause or bequest therein altered or changed by *any words*. Is this a revocation by words? I apprehend not; the deceased did not say, "I revoke my will," but in effect says, "Mr. George is in possession of my will; I am not able to destroy it myself, but I desire that he will destroy it;" and this amounted to a present intention absolutely to revoke, which was written down at the time, approved of by the deceased, and by her direction communicated to the person in whose custody the will was; it was *an absolute direction to revoke, reduced into writing in the deceased's lifetime*. There is nothing in the Statute of Frauds which prevents such revocation having effect, and it is clear that, prior to that Statute, a will might be so revoked. Further, the deceased subsequently directed a letter to be written to Mr. George, intimating that she would give her reasons thereafter, and evinced anxiety for a reply to that letter down to the time of her death; there can be no doubt that she died in the intention to revoke the will, and in the belief that it was revoked.

I am of opinion, that the will in this case is revoked, and that the deceased is dead intestate.

The Queen's Advocate and *Nicholl*, for Captain John Edward Walcott.

Lushington and *Haggard*, contra.

FREEMAN *v.* FREEMAN.

CHANCERY. 1854.

[*Reported* 5 *De G. M. & G.* 704.]

THIS was an appeal from a decision of *Vice-Chancellor Wood*, holding that a will expressly devising copyhold estates was not revoked, as to those estates, by a subsequent will.

The case is reported in Mr. Kay's Reports, page 479, and the material facts with reference to the appeal were the following: —

The testator Thomas Freeman was, at the time of making each of the wills, entitled, upon the death and failure of issue of his brother, to the reversion in fee of certain copyhold hereditaments, holden of the manor of Bromyard, but which he never surrendered to the use of either will. He was also entitled to certain freehold hereditaments in fee-simple in possession.

The earlier will was dated the 18th of June, 1804, and was executed and attested as the law then required in order to pass freehold estates

by devise. After directing that all the testator's just debts and funeral expenses, and the expenses of proving that his will, should be paid and discharged by his executrix and executors thereinafter named, and charging his estate and effects with the payment thereof, the will proceeded as follows: "I give, devise, and bequeath unto my wife Elizabeth Freeman, for her life, in case she shall not marry again, subject as hereinafter mentioned, all the estate, right, title, and interest which I have of, in, or to all and every or any of the freehold, leasehold, and copyhold estates given and devised by the will of my late father to my brother Edward Freeman, with remainder or reversion to the right heirs of my said late father, in default or failure of issue of my said brother Edward, and also all and every other estate and estates, whatsoever and wheresoever, freehold, leasehold, or copyhold, and to which I have any right or title whatsoever, in possession, reversion, remainder, or expectancy, to hold to my said wife and her assigns for her life; subject to and I do hereby subject and charge the said premises, and every part thereof so as aforesaid given to my said wife, with the breeding up, maintaining, and educating of my two younger sons, Thomas Dew Freeman and John Freeman, and my daughter Eliza Freeman; and from and immediately after the decease or second marriage of my said wife, which shall first happen, I give, devise, and bequeath all the aforesaid messuages, tenements, lands, estates, and premises unto my said two younger sons, Thomas Dew Freeman and John Freeman, and my daughter Eliza Freeman, their heirs, executors, administrators, and assigns forever." The will also contained the following clause: "And whereas my eldest son Edward Bellingham being well provided for by the will of my father, I give him by this my will the sum of £10 only, by way of acknowledgment;" and the testator thereby appointed his wife Elizabeth Freeman, his brother Edward, and his cousin Richard Barneby, joint executrix and executors of that his will.

The subsequent will was dated the 25th of August, 1807, and was similarly executed and attested. It was as follows:—

This is the last will and testament of me Thomas Freeman, of the Whitehouse, in the parish of Suckley, and county of Worcester, gentleman: whereas, in and by the will of my late father, Thomas Freeman, deceased, my eldest son, Edward Bellingham Freeman, will become, upon my decease, entitled to all my freehold estates, which will make an ample provision for him: Now I do hereby give and bequeath to my wife Elizabeth Freeman, for and during the term of her natural life, all and singular the stock, crop, and effects, both real and personal estates, of what nature or kind soever, and from and after her decease, I leave and bequeath all my crop, property, personal estates, and effects, of what nature or kind soever, and from and after her decease I do give and bequeath all and every my child or children (except the said Edward Bellingham), who shall or may be living at the time of

my decease, to be equally divided between them, share and share alike; and I make, nominate, declare, and appoint my wife sole executrix of this my will. In witness whereof I have hereunto set my hand and seal, the 25th of August, 1807.

THOMAS FREEMAN.

The testator died in September, 1807. He left him surviving his widow and Edward Bellingham Freeman, who was his eldest son and heir-at-law, and also his heir according to the custom of the manor of Bromyard. His three younger children, Thomas Dew Freeman, John Freeman, and Eliza Freeman, and with two other children named Louisa Freeman and Mary Ann Freeman (who were both born after the date and execution of the earlier will), also survived him.

The testator's widow died in 1827, and his brother, Edward Freeman, died in October, 1851, without leaving issue.

The plaintiffs in the present suit were Thomas Dew Freeman, and persons claiming under others of the testator's younger children; and the defendants were persons claiming under the customary heir, and some of the younger children.

The bill sought to have the want of a surrender of the copyhold premises to the use of the testator's will supplied, and an injunction to restrain proceedings in ejectment, which were in the course of prosecution by the persons claiming under the customary heir.

The Vice-Chancellor decided in favor of the plaintiffs. The defendants claiming under the customary heir appealed.

Mr. W. M. James and *Mr. Metcalfe*, for the plaintiffs, and *Mr. Rolt* and *Mr. Hislop Clarke* for defendants in the same interest.

Mr. Chandless and *Mr. Berkeley*, for the appellants.

THE LORD JUSTICE KNIGHT BRUCE. It is conceded in this case on the part of each of the plaintiffs and defendants, that the copyhold estate in dispute is the only copyhold property that the testator Thomas Freeman, the son, had or was interested in; that he never surrendered any copyhold property to the use of his will; that his customary heir was sufficiently provided for independently of copyhold property; that the testator, when he executed the second of the two testamentary instruments in question, had a freehold estate held by him in fee-simple devisable and devised by it; that accordingly, if it had been his only testamentary instrument, not one of the respondents would have any title or claim to the copyhold property in dispute, or any interest in any part of it; and that, on the other hand, if the earlier had been his only testamentary instrument, the equitable title to the copyhold property would clearly not be as the appellants contend. The controversy to be determined, therefore, is, whether the testator died intestate as to this property; for, if he did not, the equitable title to it became, upon his death, governed by the earlier of the two testamentary instruments. But the testator did not die intestate as to his copyhold property, unless the earlier was revoked by the later of the

two instruments, at least as to that property. The later instrument, however, does not profess or purport to revoke, nor does it notice any other testamentary disposition of the testator or give or affect any part of his copyhold property. It may be true that the second testamentary instrument disposes of some, or the whole, of his other disposable property, in a manner differing materially from the intention of the earlier instrument, but (I repeat) the later instrument does not devise or affect — does not profess to devise or to affect — the copyhold estate or any part of it. Both instruments, then, as it seems to me, may well stand in force as containing together all the testator's testamentary dispositions, those contained in the later paper superseding of course, so far, but only so far, as they contradict or depart from, those contained in the earlier document; for the mere circumstance that, in the later instrument, he calls it his last will and testament, and uses the expression "this my will," amounts, in my opinion, to nothing, so far at least as real estate is concerned. That is to say, I consider that, for every present purpose at least, it cannot be read or construed otherwise than it would have been right to read and construe it, if instead of using the words "the last will and testament" he had said "a testamentary instrument," and instead of saying "sole executrix of this my will" he had said "my sole executrix."

If he had begun it with the words, "This is my only will," it might have been open to different considerations. But, I repeat, whatever may be the view of the Ecclesiastical Courts, I do not think a temporal court bound to say that when a man in an instrument, containing testamentary dispositions by him, describes it as his last will and testament and otherwise calls it his will, he is to be taken *prima facie* as meaning wholly to annul any former testamentary instrument made by him extending to matters to which the later does not extend.

It appears to me that the appellants have no ground for complaining of the decree, and that their petition of appeal ought to be dismissed with costs.

The Lord Justice Turner. The question is whether the subsequent will operates as a revocation of the prior one, the former unquestionably pointing to copyholds, the latter not in any manner pointing to that description of property. No case has been cited where a distinct property having been given by a first will, the disposition of it has been revoked by another will making no reference to that property. I am not inclined to extend the principle of the decisions for the purpose of creating an intestacy, which would, in this case, be the consequence of the extension.

It is not necessary to say what indication of intention to dispose of property by a subsequent will may be sufficient to effect a revocation of an earlier testamentary disposition, although no effectual disposition of the property may be contained in the later document. That is not here the question. The testator, in this case, must be taken to have known when he made the second will that he had disposed of the prop-

erty in question by the first. It is said, however, that the law of the Ecclesiastical Courts is different, but the principle on which those courts act may be explained by the circumstance that they regard the appointment of the executor as disposing of the whole of the personal estate. That principle has never been applied to real estate in this country, and by deciding in favor of the appellants we should be extending it to a case to which, in my judgment, it ought not to be extended. Those who represent the heir ought not, I think, to have brought the action of ejectment, and had the case come originally before me, I should have thought that they ought to have suffered the consequences of having done so; but the Vice-Chancellor has dealt more mercifully with them, and I will not depart from his decision. They must, however, pay the costs of this appeal.

PLENTY *v.* WEST.

PREROGATIVE COURT OF CANTERBURY. 1845.

[*Reported* 9 *Jur.* 458.]

SIR HERBERT JENNER FUST.[1] The question is, whether there is any rule of law binding upon the court to give effect to these papers, and so to prevent a partial intestacy. The circumstances of the case are these: The deceased left three testamentary papers, a will dated October 5, 1837, a will and codicil dated April 13, 1838. Probate has already been granted of the two papers dated in April, 1838, and the court is now asked to revoke that probate, and to decree probate of all three papers, as together containing the last will and testament of the deceased. The first observation, which the case suggests, is this, the deceased had practised as a solicitor, and had been clerk of the peace for the county of Berks, he must, therefore, be presumed to have known what would be a good and valid disposition of his property. The will of 1837 is very short, and contains a disposition of the whole of his property. The will of 1838 commences in these words: "This is the last will and testament of me, William Budd," so that it clearly purports to be his last will, and it is all in his own handwriting. However, it is true, that it contains only a partial, a very partial, disposition of his property, and if it stands alone, the deceased will be dead intestate with respect to the greater portion of his estate. Then, the third paper is this, "Of this my will, I appoint C. S. and W. W. executor and executrix. As witness my hand, the day and year above written." This is duly executed and written on the same sheet of paper as the will of 1838. So that this will of 1838 is twice declared by the testator to be his will, or last will, and I am asked to say, that it is not so, but that the will of 1837 is also a part of his last testament. I have heard no case cited from this court, which would enable me to pronounce such

[1] The opinion only is printed.

a sentence. Nor do I see how I am to declare that to be a part of a will, to which I find that the testator, in instruments of a later date, makes no reference whatever, and to which, as appears by the evidence, he made no allusion when he executed the subsequent papers. I have been referred to a rule which is said to exist with respect to real property, but I know of no such rule applying to personalty. I must collect the intention of the testator, as I best can, from all the circumstances of the case, and I can find nothing to show that he intended all three papers to be taken together. It is certainly desirable to avoid a partial intestacy; but the appointment of executors in the second paper, of 1838, is sufficient to make a complete will, for all the property of the deceased must pass through their hands. Looking, then, to the intention of the testator, and the absence of any case in these courts in support of the doctrine contended for, I am of opinion, that the will of 1837 was, in fact, though not formally, revoked, and I direct the probates of the will and codicil of 1838 to be delivered out.[1]

Dr. R. Phillimore, for Caroline Plenty.

Dr. Addams, for West and Budd.

LEMAGE *v.* GOODBAN.

COURT OF PROBATE. 1865.

[*Reported L. R.* 1 *P. & D.* 57.]

THIS was a cause of revoking a probate, which had been granted on motion, of the will of the testator, John Lemage, who died on the 25th of January, 1864, at an advanced age, a bachelor, without parent, leaving Rachael Lemage, his sister by the whole blood, and Marmaduke Lemage, the plaintiff, his brother by the half blood, his sole next of kin, and the only persons entitled in distribution to his personal estate, him surviving. He left freehold and leasehold property and personal effects of considerable value. There were discovered after his death only two finished testamentary papers, both in holograph, the earliest unattested, and dated the 24th of December, 1823, and the later one purporting to have been attested by three witnesses, and which, from the watermark and from internal evidence, as well as that of one of the attesting witnesses, must have been executed between the years 1827 and 1829.

The earliest will described in the proceedings as paper A was in the following terms: "In the name of God, Amen. I, John Lemage, of

[1] In the report of this case in 1 Rob. Ecc. 264, the testamentary writings are given at length. By the first will the testator gave all his estate, real and personal, to three persons in trust to divide the same between three boys on their reaching twenty-one. The second will gave all the testator's "household goods at Newbury" to C., gave successive life estates in all his real estate "as well freehold, copyhold, or leasehold," to several persons, "and then as to all my copyhold estate of Burghclere" to B. in fee.

No. 31, Gloucester Street, in the parish of St. George's, &c., do make this my last will and testament in manner following: First, and principally, I commend my soul to God, &c., and as to such worldly estate as God of his goodness hath bestowed on me, I give and dispose thereof as follows — that is to say, I give and devise unto and to the sole use of my dear sister, Rachael Lemage, spinster, at present residing at, &c., to her, her heirs and assigns, all and everything which I may possess in the world at the time of my decease, namely, my freehold house, situated and being No. 10, Great Earl Street, Seven Dials; also my leasehold estate, situate and being No. 54, St. John Street Road, &c.; likewise all the money that I may possess, whether in cash or bonds as security for money, such as India Bonds, Danish Bonds, Spanish Bonds, together with seven hundred and fifty-one rentes in the French Funds, and being inscribed in the great book as above, with all interests on rentes which may be due on the aforesaid. I likewise bequeath to dear sister before-named all my household furniture, plate, linen, china, watch, chain, seals, or trinkets of any kind belonging to me, also all my books, prints, paintings, mathematical and philosophical instruments, wearing apparel, &c., &c., &c.; and do hereby appoint and make my dear sister, the aforesaid Rachael Lemage, my whole and sole executrix, requesting her to pay the expense of my funeral out of the effects, together with a bond held by my father from me for £400 sterling, should he demand the same, the said bond being the only one which I owe, nor any debts, except for rent, which will only be from the preceding quarter day. If from my ignorance of the law I should have omitted anything, I here repeat that it is my wish and most solemn will that my dear sister, Rachael Lemage, shall come into possession of everything which I may possess at my decease. This 24th day of December, 1823 — John Lemage."

The later will, described as paper B, was as follows: "In the name of God, Amen. I, John Lemage, of No. 31, Gloucester Street, Queen's Square, &c., *do make this my last will and testament in manner and form following:* I give, devise, and bequeath unto my dear sister, Rachael Lemage, spinster, the whole of my moneys and securities for moneys whatsoever and wheresoever, as the whole of money inscribed in my name in the great book in the Bank of France, about seven hundred and fifty-one rentes, or whatever it may be; also all bonds of whatever description. I further give unto my sister aforesaid my leasehold house in St. John Street Road. I also give and devise and bequeath unto my sister my half-share of the freehold house left me by my father in Earl Street, Seven Dials. I also give unto my sister aforesaid the annuity or rent-charge secured to me by Maria Lemage, widow of my father, on my said father's estate. I likewise give unto my sister aforesaid all my plate, linen, and china, philosophical instruments, *and effects of every kind and description, together* with the whole of the above specified for her use, or her heirs, executors, administrators, or assigns forever, according to the description thereof,

that is, the said property. I do further devise and bequeath unto my sister aforesaid, or to her heirs, executors, administrators, or assigns, my share or portion of the money that shall be produced from the sale of the estate of my father, which he directed by his will to be divided among his six children, as described, or to their heirs, executors, administrators, and assigns. *I further distinctly state that if I have omitted any legal point or form, that is my intention that my sister Rachael Lemage shall die possessed of, for her own use and disposal, how to whom she pleases.* And I do hereby nominate and appoint my sister whole and sole executrix to this my last will and testament. (S. D.) J. LEMAGE. Signed, sealed, declared, and published by the above-named John Lemage, as and for his last will and testament, in the presence of us, who at his request and in his presence have subscribed our names as witnesses. (S. D.) GEORGE CHARLTON; (S. D.) JOSEPH WELLSHER; (S. D.) HENRY EASTON."

On the 26th day of April, 1864, Rachael Lemage, without notice to the plaintiff, who was then unaware of his half-brother's death, obtained a decree on motion, for probate of the two papers A and B, as together containing the last will of the testator, to be granted to her, and afterwards took probate thereof as sole executrix. Rachael Lemage shortly afterwards died. The plaintiff subsequently, upon ascertaining what had been done, extracted a citation from the registry calling upon the executors of Rachael Lemage to bring in the probate and show cause why it should not be revoked, and probate granted of the last will only.

The defendants, the executors of Rachael Lemage, appeared to the citation, and delivered a declaration wherein they alleged, "that the testator wrote and signed the paper writing bearing date the 23d day of December, 1823, and now in the registry of the court, and marked A, beginning thus, &c., and ending thus, &c., that at some time subsequent thereto, and prior to the year 1830, he duly signed the paper writing marked B now remaining in the registry of this court, beginning thus, &c., and ending thus, &c., and subscribed the same in the presence of three witnesses, and alleged his capacity at the time of the execution of the two paper writings, and that the said paper writings A and B together contain the last will and testament of the said testator; and that on the 7th day of January, 1864, probate of the last will and testament, as contained in the said paper writings A and B, was granted to the said Rachael Lemage by the principal registry after the court had been moved to make the said grant. That the said Rachael Lemage died on, &c., leaving a will, whereby she appointed the defendants executors, who had duly proved the same. The plaintiff by his pleas,

1. Denied that the said paper writings marked A and B together contained the last will and testament of the testator, as in the declaration alleged.

2. That the said paper writing marked A was revoked by the said paper writing marked B; upon which pleas issue was joined.

The Queen's Advocate (*Sir R. J. Phillimore*) and *Dr. Spinks*, for the defendants.

Dr. Tristram and *W. Forster*, for the plaintiff.

Cur. adv. vult.

Sir J. P. Wilde. After carefully considering the authorities cited in argument, I retain the opinion expressed on the *ex parte* application for probate. The case of *Plenty* v. *West*, 1 Rob. Ecc. 204, so far as it supports the doctrine, that the use of the words "last will" in a testamentary paper, necessarily imports a revocation of all previous instruments, is, I think, overruled by *Cutto* v. *Gilbert*, 9 Moore, P. C., and *Stoddart* v. *Grant*, 1 Macq., and the case of *Henfrey* v. *Henfrey*, 4 Moore, P. C. 29,[1] only decides that, a second will disposing of the whole estate, revokes a former disposition. Cases of the present character are properly questions of construction, and in deciding upon the effect of a subsequent will on former dispositions, this court has to exercise the functions of a court of construction. The principle applicable is well expressed in Mr. Justice Williams' book on Executors. He says, "The mere fact of making a subsequent testamentary paper, does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that as no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate, as together containing the last will of the deceased. And if a subsequent testamentary paper be *partly* inconsistent with one of an earlier date, then such latter instrument will revoke the former, *as to those parts only*, where they are inconsistent." This passage truly represents the result of the authorities. The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the Statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so executed. Redundancy or repetition in such independent papers, will no more necessarily vitiate any of them, than similar defects if appearing on the face of a single document. Now it was argued that in the case of more than one testamentary paper, each professing in form to be the last will of the deceased, it is necessary for the court, before concluding that they together constitute the will, to be satisfied that the testator intended them to operate together as such. In one sense this is true, for the intention of the testator in the matter is the sole guide and control. But the "intention" to be sought and discovered, relates to the disposition of the testator's property, and not to the form of his will. What dispositions did he intend? — not which, or what number, of papers did he desire

[1] In this case both wills disposed of the whole of the testator's property. The first will appointed executors; the second did not. — Ed.

or expect to be admitted to probate, — is the true question. And so this court has been in the habit of admitting to probate, such, and as many papers (all properly executed), as are necessary to effect the testator's full wishes, and of solving the question of revocation, by considering not what papers have been apparently superseded by the act of executing others, but what dispositions it can be collected from the language of all the papers that the testator designed to revoke or to retain. In this case such a task is not difficult. The first paper makes the testator's sister the sole object of bounty and residuary legatee. The second is to the like general effect; no new object of bounty is introduced, and the sole reason for its execution seems to have been, that the testator's father had died in the interval, and that half a freehold house, and a share of personalty, had devolved on him by that event. These new acquisitions he devises and bequeaths in the same direction. But the residue is not disposed of, the clause apparently intended for that purpose being defective in its language, and not reading sensibly. The court, can, however, see thus far into the intent of that clause — that the object of it was the same sister whose name alone appears in both papers. It would not be reasonable, under such circumstances, to conclude that the testator intended to revoke the residuary bequest in the first paper, and as effect can only be given to that disposition by granting probate of the first and second papers as together constituting the will — The Court so decides. I pronounce for the two papers.

Dr. Tristram asked for the plaintiff's costs, to be paid out of the estate.

Dr. Spinks, contra.

Sir J. P. Wilde. Acting upon the rule I have laid down for my own guidance, I think that the plaintiff's costs should be paid out of the estate. The litigation was justified by the state in which the testator left his testamentary papers.[1]

[1] "It becomes necessary on the present occasion to consider more minutely the nature and extent of the inconsistency of a later testamentary instrument, which will have the effect of revoking an earlier will. In this investigation the court is necessarily called upon to put a construction upon the language of the instrument in question. The intention of the testator conveyed in that language has to be ascertained by reference to the facts in connection with which it was used; but in seeking for the true meaning of the testator, the substance and not the form of the instrument must be regarded. If it can be collected from the words of the testator in the later instrument that it was his intention to dispose of his property in a different manner to that in which he disposed of it by the earlier document, the earlier document will be revoked, and this, although in some particulars the later will does not completely cover the whole subject-matter of the earlier. This is what was decided in *Plenty* v. *West*, 1 Rob. Ecc. 264. There the court held upon all the facts before it, that it was the intention of the testator that the later paper should stand alone, although that disposed of a part only of his personal estate, and therefore that in effect, although not in terms, it revoked the earlier will. The authority of that case has been stated by Sir E. V. Williams to be doubtful since the decision of the Privy Council in *Cutto* v. *Gilbert*, and Lord Penzance is said to have regarded it as overruled. The case of *Cutto* v. *Gilbert*, however, merely decides that the bare fact of a testator having executed an instrument as his last will and

B. *Revocation by Destruction or Cancellation.*

BIBB *v.* THOMAS.

KING'S BENCH. 1775.

[*Reported* 2 *W. Bl.* 1043.]

EJECTMENT. On trial before *Hotham*, Baron, the question was, Whether a will made by one William Palin was duly revoked? It appeared in evidence that Palin (who had for two months together frequently declared himself discontented with his will), being one day in bed near the fire, ordered Mary Wilson, who attended him, to fetch his

testament, the contents of which are unknown, does not operate as a revocation of a previous will, and this seems very obvious, for the missing instrument may have been confirmatory of the first (see Wms. Executors, p. 156, note *c*). It certainly does not appear from the judgment in that case, that there was any intention to overrule the decision in *Plenty* v. *West*. Dr. Lushington says (9 Moore, P. C. at p. 146): 'Upon this case we will first observe that the two wills were essentially different, that no executors were appointed by the first, that executors were appointed by the second, and that the only ground of argument for the uniting the papers was, that the whole of the personal estate was not disposed of by the second will. It is true that Sir H. J. Fust, in his judgment, relies upon the fact that the testator called the will of 1838 his last will, but that is only one circumstance in conjunction with others on which he founded his decision.' The Judicial Committee thus appear to have approved of the decision in *Plenty* v. *West* upon the ground that the fact that the whole of the personal estate was not disposed of by the second will, was not by itself a sufficient reason for uniting the earlier with the later will, and admitting both to probate, the wills being in other respects essentially different. And Lord Penzance, in *Lemage* v. *Goodban*, does not say that *Plenty* v. *West* is overruled; but with his accustomed accuracy, only says, 'the case of *Plenty* v. *West*, so far as it supports the doctrine that the use of the words "last will" in a testamentary paper necessarily imports a revocation of all previous instruments, is, I think, overruled by *Cutto* v. *Gilbert*.' Lord Penzance further says: 'The intention of the testator in the matter is the sole guide and control. But the intention to be sought and discovered relates to the dispositions of the testator's property and not to the form of his will. What dispositions did he intend? not which or what number of papers did he desire or expect to be admitted to probate? is the true question.' I followed that decision *In the Goods of Petchell*, L. R. 3 P. & M. 153. In that case I considered that the intention of the testatrix in the second will was to benefit her daughter by postponing the payment of the specific legacies until after the daughter's death, and that no intention appeared to deprive her daughter of the residue after payment of the legacies. I therefore came to the conclusion that the original residuary bequest in her favor was not revoked.

"Even if the second instrument contains a general revocatory clause, that is not conclusive, and the court will, notwithstanding, consider whether it was the intention of the testator to revoke a bequest contained in a previous will: *Denny* v. *Barton*, 2 Phillim. 575. On the other hand, though there be no express revocatory clause, the question is whether the intention of the testator, to be collected from the instrument, was that the dispositions of the earlier will should remain in whole or in part operative. Dr. Lushington, in giving the judgment of the Privy Council in *Henfrey* v. *Henfrey*, says, 'the question is total revocation or partial revocation.' And on this question Sir J. Nicoll says, in *Methuen* v. *Methuen*, 2 Phillim. 426, 'In the Court of Probate

will, which she did, and delivered it to him; it being then whole, only somewhat creased. He opened it, looked at it, then gave it something of a rip with his hands, and so tore it as almost to tear a bit off; then rumpled it together, and threw it on the fire; but it fell off. However, it must soon have been burned, had not Mary Wilson taken it up, and put it in her pocket. Palin did not see her take it up, but seemed to have some suspicion of it, as he asked her what she was at, to which she made little or no answer. He at several times afterwards said, "That was not and should not be his will," and bid her destroy it. She said at first, "So I will, when you have made another;" but afterwards, upon his repeated inquiries, she told him she had destroyed it (though in fact it was never destroyed), and she believed he imagined it was so. She asked him, when the will was burned, whom his estate would go to? He answered, to his sister and her children. He afterwards told one J. E. that he had destroyed his will, and should make no other till he had seen his brother, John Mills, and desired J. E. would tell him so, and that he wanted to see him. He afterwards wrote to Mills in these terms: "DEAR BROTHER, — I have destroyed my will which I made, for upon serious consideration I was not easy in my mind about that will." Afterwards desires him "to come down, for if I die intestate it will cause uneasiness." He however died, without making any other will. The jury, with whom the judge concurred, thought this a sufficient revocation of the will, and therefore found a verdict for the plaintiff, the lessee of the heir-at-law.

Grose moved for a new trial, because this was not a sufficient revocation within the Statute of Frauds.

Davy and *Adair* showed cause.

And PER TOTAM CURIAM (DE GREY, C. J., GOULD, BLACKSTONE, and NARES, JJ.). This is a sufficient revocation. A revocation under the Statute may be effected, either by framing a new will amounting to a revocation of the first, or by some act done to the instrument or will itself, viz., burning, tearing, cancelling, or obliteration by the testator, or in his presence, and by his directions and consent. But these must be done *animo revocandi*. *Onions and Tyrer*, 1 P. Wms. 343; *Hyde and Hyde*, 1 Equ. Cas. Abr. 409. Each must accompany the other; revocation is an act of the mind, which must be demonstrated by some outward and visible sign or symbol of revocation. The Statute has specified four of these; and if these or any of them are performed in the slightest manner, this, joined with the declared intent, will be a good revocation. It is not necessary that the will, or instrument itself,

the whole question is one of intention; the *animus testandi* and the *animus revocandi* are completely open to investigation in this court.' In the present case I am of opinion that the intention of the testatrix, to be collected from the dispositions of the two wills, is that the second should stand alone, and be in complete substitution for the first, and that it contains all the testamentary depositions which she intended at that time to constitute her last will and testament, and consequently that it does by implication revoke the whole of the will of 1858." — *Per* SIR J. HANNEN, in *Dempsey* v. *Lawson*, 2 P. D. 98, 105–107 (1877).

be totally destroyed or consumed, burned, or torn to pieces. The present case falls within two of the specific acts described by the Statute. It is both a burning and a tearing. Throwing it on the fire, with an intent to burn, though it is only very slightly singed, and falls off, is sufficient within the Statute.

Rule discharged.

LARKINS *v.* LARKINS.

COMMON PLEAS. 1802.

[*Reported* 3 *B.* & *P.* 16.]

THE following case was sent by the Master of the Rolls for the opinion of this court: —

William Larkins, by his will dated in 1794, gave all his land at Calcutta "unto my brother John Pascall Larkins, and to my good friend Samuel Enderby, of Aldermanbury, in the city of London, Esquire, and George Smith, of Lincoln's Inn, in the county of Middlesex, Esquire, their heirs and assigns, upon trust," to sell the same, the proceeds to be taken "as part of the residue of my estate and effects, and go therewith as hereafter directed;" and he gave the residue of his estate and effects, real and personal, to the said Larkins, Enderby, and Smith, their heirs, executors, administrators, and assigns, upon certain trusts.

The testator had no other real estate than that at Calcutta.

After the testator had executed the will, he struck out, by drawing a pen through them, these words in the devise of the Calcutta land, viz.: "George Smith, of Lincoln's Inn, in the county of Middlesex." The name of George Smith was struck out from the residuary devise also. The testator never republished the will after making these alterations.

The question for the opinion of the court was, Whether the devise of the estate at Calcutta to the trustees named in the will was revoked by the testator's having struck out Smith's name?[1]

Best, Serjt., for the plaintiffs.

Shepherd, Serjt., *contra*.

LORD ALVANLEY, C. J. I have no doubt upon this case. A revocation by obliteration will have the same effect which a revocation by any other means will have, and no more. I lay out of the case the consideration of the devisees being trustees, for in a court of law they must be considered as joint tenants in fee absolutely. Now it is argued, that the revocation of the devise as to one devisee makes an alteration in the interest of the others. But whatever this alteration be, it is not an alteration arising from a new gift, but merely from a revocation. If the remaining devisees were to acquire any estate which they had not before, something beyond a mere revocation would be necessary. If therefore the devisees had been tenants in common,

[1] The statement is abbreviated from the report.

upon the erasure of one name the remaining two would take no more than two thirds of the estate.

Rooke, J. It is rather extraordinary that this point should now come to be decided for the first time; but though the point be new, I entertain no doubt that the erasure of the name of George Smith is to be considered as a revocation of the devise *pro tanto* only.

Chambre, J. It would be most unreasonable to defeat the intention of a testator so plainly expressed as it is in the present case; and before we could come to such a decision I should expect authorities to be cited previous to the Statute of Frauds. For the revocations enumerated in the Statute were revocations at common law, and stand upon the same footing as if that Statute had never passed, it being declared that the restrictions introduced by that Statute should not extend to those revocations. The only argument of any weight which has been used is, that the remaining devisees take a larger interest. But that argument does not apply here; for the devisees, being joint tenants, are seised *per my et per tout;* and if one joint tenant die in the life of the testator, the other joint tenant takes the whole of the estate, though it never vested in him during the life of the testator; the reason of which is, that the original devise is sufficient to pass the whole interest. The case of a tenant in common is indeed different, he being only seised of an undivided moiety. The effect of this act of obliteration, as it appears to me, is to take away that from G. Smith which the testator at first intended to give him. I cannot entertain a doubt upon the subject; and indeed the authorities cited are all one way.

DOE d. PERKES *v.* PERKES.

King's Bench. 1820.

[*Reported* 3 *B. & Ald.* 489.]

Ejectment for messuages and lands in the parish of Walsall. Plea, Not guilty. At the trial before *Holroyd*, J., at the last assizes for the county of Stafford, it was admitted that the lessor of the plaintiff, as the brother and heir-at-law of one Charles Perkes, deceased, was entitled to recover, unless the defendants could establish the will under which they claimed. The will had been duly executed by the testator to pass real property, and the only question was, whether he had not revoked it by tearing it, and upon that point it was proved by one Joseph Worrall, that in August, 1816, the testator, having had some quarrel with one of the parties who was a devisee named in his will, in a fit of passion, took his will out of his desk, and said to Worrall, "Joe, you shall see if I have done anything for the rascal or not. I have made him a gentleman." He then began to tear the will, and tore it twice through; the witness then laid hold of his arms and entreated him to abate his passion. The devisee then, who was present, put his hands

together, as if in an attitude of prayer, and said, "Consider my family. I beg your pardon for what I have said. Had I been worthy to have known what had been done for me, I should have been satisfied." Upon this, the testator became calm, and the witness let loose his arms. The testator then folded up the will, and put it in his pocket, and afterwards pulled it out again, and said, "It is a good job it is no worse," and after fitting the pieces together, he added, "there is nothing ripped that will be any signification to it." The will was found after the death of the testator, in four parts. Upon this evidence, the learned judge left it to the jury to say whether the testator had done all he intended, or whether he was not prevented from completing the act of destruction he intended. The jury found a verdict for the defendants, establishing the will; and now

W. E. Taunton moved for a new trial, and contended that the cancellation was complete by the tearing of the will with the intent to destroy it, and he cited *Pemberton* v. *Pemberton*, 13 Ves. Jr. 290; *Bibb* v. *Thomas*, 2 Black. 1043; *Hyde* v. *Hyde*, 1 Eq. Cases Abr. 408; and *Onions* v. *Tyrer*, 1 Peere Williams, 343.

ABBOTT, C. J. Upon the evidence, it appears, in the present case, that the testator, being moved with a sudden impulse of passion against one of the devisees under his will, conceived the intention of cancelling it, and of accomplishing that object by tearing. Having torn it twice through, but before he had completed his purpose, his arms were arrested by a bystander, and his anger mitigated by the submission of the party who had provoked him; he then proceeded no farther, and after having fitted the pieces together, and found that no material word had been obliterated, he said, "It is well it is no worse." Now, if the cancellation had been once complete, nothing that took place afterwards could set up the will. But it was a question for the jury to determine whether the act of cancellation was complete. They have found that it was not, and that it was the intention of the testator, if he had not been stopped, to have done more, in order to carry his purpose into effect. I can see no reason to think that verdict wrong.

BAYLEY, J. I think this verdict right. If the testator had done all that he originally intended, it would have amounted to a cancellation of the will; and nothing that afterwards took place could set it up again. But if the jury were satisfied that he was stopped *in medio*, then the act not having been completed will not be sufficient to destroy the validity of the will. Suppose a person having an intention to cancel his will by burning it, were to throw it on the fire, and upon a sudden change of purpose, were to take it off again, it could not be contended that it was a cancellation. So here, there was evidence from which a change of purpose before the completion of the act, might properly be inferred. The jury have drawn that inference, and I see no reason to disturb the verdict.

HOLROYD, J. I was of opinion, at the trial, that if the act of tearing was completed nothing that took place afterwards was sufficient to set

up the will again. The Statute of Frauds says, "that no devise in writing of lands shall be revocable, otherwise than by some other will, or by burning, cancelling, tearing, or obliterating the same by the testator," &c., but, in order to effect this, the act of tearing, &c. must be complete. I left it to the jury to say, whether that was so, and they were of opinion, that the testator had not completed the act he had intended, and I thought that they drew the right conclusion from the evidence.

Best, J. I am of opinion, that the verdict is right. Tearing is one of the modes by which a will may be cancelled; but it cannot be contended that every tearing is a cancellation: for if it were, a testator, who took his will into his hands with intent to tear it, must, if he should tear it in the smallest degree and then stop, be considered as having cancelled it. The real question in these cases is, whether the act be complete. If the testator here, after tearing it twice through, had thrown the fragments on the ground, it might have been properly considered, that he intended to go no farther, and that the cancellation was complete; but here there is evidence, that he intended to go farther, and that he was only stopped from proceeding by an appeal made to his compassion by the person who was one of the objects of his bounty. The case in Blackstone is very distinguishable; for there the testator completed his purpose, although the will was not destroyed. I see no reason, therefore, for disturbing the verdict.

Rule refused.

DOE d. REED *v.* HARRIS.

King's Bench. 1837.

[*Reported* 6 *A. & E.* 209.]

Ejectment for messuages and other premises. On the trial before *Patteson*, J., at the Glamorganshire Summer Assizes, 1835, it appeared that the lessor of the plaintiff claimed as son and heir-at-law, the defendant as devisee, of John Reed. The will was duly executed in August, 1832. The testator died December 31st, 1834. He was an old and infirm man: the defendant was his niece, and lived with him as his housekeeper. She exercised great influence over him; but it appeared that they had violent quarrels, and that he sometimes spoke of her to other persons in very abusive terms, and said that he feared danger to his life from her. A witness named Esther Treharne, who had been the testator's servant, stated that, about a month before he died, she was shaking up the cushion of his easy-chair, and observed, under the cushion, a folded paper. It was brown or cartridge paper, and the corner of it was burned. Shortly after, on the same day, Alice Harris went out; and, while she was away, the testator inquired for the paper: the witness told him where she had seen it, upon which he exclaimed

that Alice had gone away with the will; and, on his then removing the cushion, the will appeared no longer. He then told the witness that he had sent Alice Harris to fetch the will to him, that he had looked into it, and that, when he had seen it, he had thrown it on the fire; and that Alice had "scramped" it off the fire. This appeared to have taken place the evening before. After the above conversation, Alice Harris returned; and, when she and the testator retired at night (both sleeping in the same room), the witness heard a quarrel, and blows; and, upon her going into the room, the testator said that Alice Harris would not give him his will. Alice went downstairs with the witness, and the latter urged her to give up the will; but she said she would not; that she had given it him last night, and he threw it on the fire; and that she would rather have the pleasure of burning it herself, and would do so the next morning. After this conversation she returned to the testator, on the witness's persuasion, begged his pardon, and promised to burn the will the following morning. The next morning, the witness, going into the kitchen where Alice and the testator were, heard Alice say, "There, everything is finished;" and the testator then told the witness that Alice had thrown the will upon the fire. The witness doubting it, he said, "She threw something with writing upon it on the fire; but I did not have it in my hand to look at it." The witness answered, "I do not think she has thrown it;" and the testator said, "I do not care; I will go to Lantwit, if I am alive and well, and make another will;" adding that Alice Harris should not have his property, and that he had a son nearer to him than her. He also said (as he did on many other occasions) that the will was one made by Alice and Mr. R. (the attorney who prepared it), and that R. was a thief, and wanted, with Alice, to get everything he had. Alice Harris, in an affidavit exhibited in the Prerogative Court, stated that, on January 1st, 1835, she found the will in a trunk used by the testator for holding his deeds and papers, and kept in his dressing-room. The will produced on the trial had no mark of fire. It did not appear that any envelope had been found upon it. The plaintiff's counsel contended, first, that the testator had been prevailed upon to execute the will by importunities of such a nature as to deprive him of his free agency; and, secondly, that, assuming the will to have been properly executed, the evidence showed a cancellation within the Statute of Frauds, 29 Car. 2, *c.* 3 § 6. The learned judge stated to the jury, on the latter point, that, if they believed the evidence of Esther Treharne, and were satisfied that the testator threw the will on the fire intending to burn it, that Alice Harris took it off against his will, that he afterwards insisted on its being thrown on the fire again, with intent that it should be burned, and that she then promised to burn it, there was a sufficient cancellation within the Statute. The jury found for the plaintiff, not stating the grounds of their verdict. In the ensuing term a rule *nisi* was obtained for a new trial, on account of misdirection on the two points above stated. It was also objected that the evidence of cancellation was not of a

proper kind; the fact being proved only by declarations, and not by the testimony of eye-witnesses, or by marks of cancellation on the will itself; and *Willis* v. *Newham*, 3 Y. & J. 518, was referred to as an analogous case.

Chilton and *James* now showed cause.

John Evans and *E. V. Williams*, *contra*, were stopped by the court.

LORD DENMAN, C. J. The Statute of Frauds requires that a will shall be executed with certain solemnities; and, after prescribing these, directs how it shall be revoked; and that is by certain acts, which are specified. In the present case, there is no evidence that any one of those acts has been done. It is impossible to say that singeing a cover is burning a will within the meaning of the Statute. The terms used in the sixth section show that to assert this would be going a length not contemplated in the Statute. The acts required are palpable and visible ones. Cases may, indeed, be put where very little has been done, as a slight tearing and burning, and yet a revocation has taken place; but the main current of the Statute is against the argument from such cases. The intention seems to have been to prevent inferences being drawn from such slight circumstances. In *Bibb dem. Mole* v. *Thomas*, 2 W. Bl. 1043, the will was slightly torn and slightly burned: and the court said that the case fell within two of the specific acts described by the Statute; there was both a burning and a tearing. Doubt might be entertained now whether the proof there given would be sufficient as to these; but, as the court considered what was done to have been a burning and a tearing, the case shows at least that they did not think the acts required by the Statute could be dispensed with by reason of the conduct of a third party. In *Doe dem. Perkes* v. *Perkes*, 3 B. & Ald. 489, the testator's hand was arrested while he was in the act of tearing the will: he submitted to the interference; and the intention of revoking was itself revoked before the act was complete. There it was properly left to the jury to say whether the testator had done all he intended or not. Neither of these cases at all approaches the present. It would be a violence to language, if we said here that there was any evidence to go to the jury of the will having been burned. Great inconvenience would be introduced by holding that there may be a virtual compliance with the Statute; but there is none in saying that, if a testator perseveres in the intention of revoking his will, he shall fulfil it by some of the means pointed out in the Statute; that he shall revoke the will, if not in his possession, by writing properly attested; or cancel it, if in his power, by some of the other acts which the Statute prescribes.

PATTESON, J. I am quite satisfied that I left this case wrongly to the jury. I did not see the distinction between the present case and *Bibb dem. Mole* v. *Thomas* as I ought. There something had been done which the court considered to be a burning and a tearing of the will. The testator is described, not as having merely done something to the corner of the will, but as having given it "something of a rip with his

hands," and so torn it "as almost to tear a bit off." It is plain that, on the production of the instrument, it would appear (though I do not think that important) that there had been some tearing of the will itself. As the Act says that there must be a tearing or burning of the instrument itself, a mere singeing of the corner of an envelope is not sufficient. To hold that it was so would be saying that a strong intention to burn was a burning. There must be, at all events, a partial burning of the instrument itself: I do not say that a quantity of words must be burned; but there must be a burning of the paper on which the will is. I am quite satisfied that I was wrong in my direction to the jury.

WILLIAMS, J. We must give effect to a Statute as providing for cases of ordinary occurrence, and not for any that may be put. It is argued that, if a testator throws his will on the fire with the intention of destroying it, and some one, without his knowledge, takes it away, that is a fraud which ought not to defeat his act. But so it might be said that, if the testator sent a person to throw it on the fire, and he did not, the revocation was still good. Where would such constructions end? The effect of them would be to defeat the object of the Statute, which was to prevent the proof of a cancellation from depending on parol evidence. The will must be torn or burned; and the question will always be whether that was done with intention to cancel: how much should be burned, or whether the will should be torn into more or fewer pieces, it is not necessary to lay down.

COLERIDGE, J. The kind of construction which has been insisted upon would lead to a repeal of the Statute on this subject, step by step. The Statute, for wise purposes, does not leave the fact of cancellation to depend on mere intent, but requires definite acts. In the making of a will, if the proper signatures were not affixed, no explanation of the want of signatures could be received; and so, when a will has been made, to revoke it, there must be some act coupled with the intention of revoking, to bring the case within the sixth section. The question is put, whether the will must be destroyed wholly, or to what extent? It is hardly necessary to say: but there must be such an injury with intent to revoke as destroys the entirety of the will; because it may then be said that the instrument no longer exists as it was. Here the fire never touched the will. It can only be said that the testator's intention to cancel was defeated by the fraud of another party. But, to instance another case under the same clause of the Statute, suppose the testator had written his revocation, and that, by the act of some other party, he had been prevented from signing, or the witnesses had been prevented from attesting it; could it be said that the testator had done all that lay in him, and therefore the act of revocation was complete? We must proceed on such a view of the Statute as accords with common-sense. *Rule absolute.*[1]

[1] See *Blanchard* v. *Blanchard*, 32 Vt. 62 (1859).

DOE d. REED *v.* HARRIS.

QUEEN'S BENCH. 1838.

[*Reported* 8 *A.* & *E.* 1.]

ON the trial of this ejectment, before *Coleridge*, J., at the Glamorganshire Spring Assizes, 1836, it appeared that the action was brought by the heir-at-law against the same devisee who was defendant in *Doe dem. Reed* v. *Harris*, reported 6 A. & E. 209; and the question, as in that case, was, whether the will had been revoked by the testator's throwing it on the fire, where the envelope had been partially burned. The evidence was, in all material points, the same as in the former case; but the lands for which that ejectment was brought were freehold; in the present case the lands were copyhold. The learned judge left it to the jury to say whether that which the testator did was an actual revocation of the will, and so intended by him; reserving leave, however, to move to enter a nonsuit or a verdict for the defendant, if the verdict should be for the plaintiff and this court should be of opinion that the judge ought to have directed a contrary verdict or a nonsuit. The jury said that they thought the will revoked by the burning; and a verdict was taken for the plaintiff. In the ensuing term *John Evans* obtained a rule to show cause why a verdict should not be entered for the defendant. In Michaelmas Term, 1837,

Chilton and *W. M. James*, showed cause.

Maule, *John Evans*, and *E. V. Williams*, contra.

Cur. adv. vult.

LORD DENMAN, C. J., in Hilary Term, 1838 (January 20th), delivered the judgment of the court.

This was an action of ejectment for copyhold premises by the heir-at-law of the person last seised against one who claimed as his devisee. The plaintiff succeeded at the trial; but leave was given to the defendant to move for a nonsuit, or for a verdict in his favor. On discussing a rule granted in conformity to this permission, the question was, whether the will (admitted to have been duly executed) had been well revoked. The facts lay in a narrow compass. The testator was much under the influence of the devisee, who lived with him as his housekeeper, but, according to the testimony of a witness to whom the jury gave credit, he had frequent quarrels with her, often complained of her behavior towards him, and on one occasion, when irritated, he threw the will upon the fire: she rescued it without his knowledge, at which he expressed his displeasure when informed of it. The paper in which it was wrapped was thereby partially burned; but the will itself was not affected by the fire. The devisee kept it till after the testator's death.

These circumstances being established in evidence, the learned judge asked the jury whether what was then done by the testator was an actual revocation of the will and so intended by him. In another case tried between the same parties the same question had arisen; and upon the same facts the court was of opinion that the will was not revoked. That ejectment was, however, brought to recover freehold lands; and our decision proceeded wholly on the express enactment of the Statute of Frauds. (His Lordship here read § 6 of Stat 29 Car. 2, *c.* 3.)

There the will itself was not burned: we therefore thought that the Statute prevented it from being revoked, and that no evidence whatever of what was said, proving an intention to revoke, could supply that deficiency. But, the property now in question being copyhold, to which the Statute of Frauds does not apply, because it is not devisable within the Statute of Wills, the point is different, and must be treated as if the first-mentioned Act had never passed. In that case, the law would have required clear evidence of a positive declaration of the intent to revoke at the time such declaration was made; or some act done with the intent thereby to revoke; and the jury would have had to determine whether in fact such declaration was made or act done.

Some doubt has been entertained whether any declaration could be sufficient without the word "revoke;" but, upon full consideration, we think it impossible so to limit the testator's power of revocation, and that any equivalent word or words and expressions would be sufficient for that purpose.

But, further, we are now required to consider whether, without any language at all, a testator may revoke a will by the conduct he exhibits. And this appears to be tantamount to an inquiry whether conduct *can* give a positive declaration of intent. If it can, there can be no more *necessity* for words than for the use of a particular expression. Now, nothing is easier than to imagine such gestures and proceedings, connected with the will, as must fully convince every rational mind that the testator intended to revoke his will, and thought he had done so by the means he took for that purpose. But if he who has power to revoke by declaring a present resolution then to do so does in fact make that resolution manifest, it seems clear that the act of revocation is complete in every essential part.

This proposition is not inconsistent with any authority in our books. Any doubt that may rest upon it may probably be the result of our habit of considering the subject since the Statute of Frauds. That law, one of the wisest in principle, though far from being complete in its details or fortunate in its execution, enacts certain formalities for giving effect to the revocation of a will; and the obvious good sense of that provision has in some way embodied itself with our ideas of revocation. But the law with respect to wills not within that Statute is the same as it was before the Statute.

This use was made of our former decision between the same parties: the will was intended to be revoked by burning, but the burning was

not complete, and the will was held not to be revoked; it follows, as the revoking act was not performed, that there was no revocation. But this is clearly a fallacy. Burning the will is one of the modes of revocation permitted by the Statute of Frauds: it follows that there must be burning of the will to some extent to satisfy the enactment: but this is a case of revocation at common law, which only requires evidence of intention; and that evidence may be found in an imperfect act or a mere attempt. The duty then of the judge, in trying a question as to such revocation of a will, was to lay before the jury the facts proved, and ask whether they amounted to a revocation. This was done on the present occasion: there was certainly evidence from which the inference might be drawn, and by which we think it was warranted. On this point, then, there is no ground for a new trial.

There was one other argument which requires notice. The testator was aware that his devisee had taken the will off the fire; he expressed his annoyance that she had recovered possession of it, and his intention to make a new will instead of it; yet he took no further steps towards its destruction or the making a new will. He was therefore said to acquiesce in its continuance; the revocation itself was said to be revoked and the will revived. This state of things may certainly exist: and, if there was evidence of it, such evidence ought to have been submitted to the jury. But we cannot think that the mere knowledge of the continuing existence in specie of a will intended to be destroyed, when accompanied with no wish to restore its efficacy, but, on the contrary, with great displeasure at its rescue from the flames, does constitute such evidence.

The recent Act (7 W. 4 & 1 Vict. *c.* 26) for amending the law of wills will probably prevent any future agitation of a question like the present, as the third section makes all property devisable, and the twentieth and twenty-second prescribe the mode of revoking wills and of reviving such as may have been revoked.

Rule discharged.

HOBBS *v.* KNIGHT.

PREROGATIVE COURT OF CANTERBURY. 1838.

[*Reported* 1 *Curt.* 768.]

JOHN HOBBS[1] died March 7, 1838; after his death there was found among his papers a will dated January 19, 1835, with three codicils written on the same paper, the first without date, the other two dated February 25, 1837. From this will the signature of the deceased was cut out. There was also found a will dated February 17, 1838, which was invalid, because not attested as required by the Wills Act, 7 Wm. IV. & 1 Vict. *c.* 26 (1837).

[1] The following statement is substituted for that in the report.

An allegation, propounding the will of 1835 with the codicils, was brought in on behalf of one of the executors. It set forth that the will was in a perfect state until after January 1, 1838 (when the Wills Act came into operation), and that the testator knew that witnesses were necessary to give validity to the will of 1838. The widow opposed the admission of the allegation.

Phillimore, for the widow.

Lushington, in support of the allegation.

Sir Herbert Jenner. The purport of the allegation, which now stands for admission before the court, is to show that the will executed by the deceased in January, 1835, remained entire and complete until after the commencement of this year (1838), when the Act of her present Majesty, entitled "An Act for the Amendment of the Laws with respect to Wills," came into operation; and the question is, Whether, under the circumstances stated in the allegation, this will is revoked? The admission of the allegation was opposed on two grounds: first, that the Act 1 Vict. c. 26, does not apply to this case at all; that the law applicable to the paper, is that which existed before the 1st of January, 1838. Secondly, that if the Act does apply, the excision of the signature of the deceased is a sufficient revocation of the will with reference to the provisions of that Statute.

On the other hand, it has been argued that the allegation is admissible on these grounds, —

First, that the Act does apply;

Secondly, that the excision of the name is not a revocation under the Statute; and

Thirdly, that supposing a will may be revoked under the Statute by the excision of the name of the testator, still, that in this case, the deceased did not intend to revoke the will until a second will should have been duly executed, which not having been done, that the will before the court remains unrevoked.

[The judge then considered the first question, and determined that the Wills Act did apply. He then continued: —]

Assuming, then, that the Statute applies to the case before the court, the next question is, Does the cutting out of the signature of the testator, the rest of the paper remaining entire, amount to a revocation of the will? In order to determine the effect of this act (the excision of the name of the testator) we must consider what is necessary to create a valid will under the Statute. The ninth section of the Statute is to this effect, "That no will shall be valid, unless it shall be in writing and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses shall attest, and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary." It appears, then, that the sig-

nature of the testator is necessary to the validity of a will; that no will is valid without it, so that it is not only a material part, but an essential part, without which a will cannot exist.

A will being so executed, the next question is, How is it to be revoked? The 20th section provides, "that no will or codicil, or any part thereof, shall be revoked, otherwise than as aforesaid" (that is, by marriage, under the 18th section) "or by another will," &c., which does not apply to this case, "or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same." Assuming then that this act was done by the deceased, it must be taken to have been deliberately done; the effect of that act is now to be considered. The signature of the testator being, as I before said, an essential part of a will, it is difficult to comprehend when that which is essential to the existence of a thing, is destroyed, how the thing itself can exist. There can be no doubt that if the name of the testator had been burned or torn out, the revocation would have been as complete as if the will had been torn into twenty pieces. If this were not the case, it would lead to many absurd consequences. But it has been argued, that as the present Act of Parliament has pointed out certain modes with regard to the revocation of wills, the court cannot go beyond the express terms of the Act; that the words being confined to burning, tearing, or otherwise destroying, omitting the terms "obliterating" and "cancelling" used in the Statute of Frauds; there must be an actual burning or tearing, or as to "otherwise destroying," that the whole instrument must be destroyed; that the cutting, in the present case, is not tearing — (burning is out of the question) — and the instrument not being destroyed, that there is no revocation; and upon this part of the argument, the case of *Doe dem. Reed* v. *Harris*, 6 Ad. & Ell. 209; 1 Nev. & P. 405, in the Queen's Bench, was referred to, in which the testator had thrown his will on the fire, with the intention of destroying it, and a part of the cover was burned, but there being no burning on the instrument itself, the judges of that court held that the will was not revoked; that the words of the Statute of Frauds had not been complied with. But that case is not applicable to the present point, for here a part of the will, the most essential part, is removed, and if in that case the name of the testator had been burned or torn off, I think the Court of Queen's Bench would have held that to be an effectual revocation by burning or tearing, for, according to the judgment in that case, it was not required that the whole will should be burned or torn. The learned judges do not say how much it is necessary should be burned, but Mr. Justice Coleridge says it is sufficient if the entirety of the will is destroyed; his expressions are these, "We were pressed with the argument: Must the whole of the document be destroyed? I say no; but there must be a destruction of so much as to impair the entirety of the will, so that it may be said that the will does not exist in the manner framed by the testator." So I say here, Is not the entirety of the will

destroyed by the removal of the signature of the testator? It is true this is not an act of tearing, in the strict sense of that term; but, if the circumstances of this case required it, I think it would not be difficult to show that a will might be revoked by cutting with an instrument as well as by tearing, if a corresponding effect be produced by the one act as by the other. The Latin equivalent for the verb "to tear," is *lacerare*, but I find, upon looking into the dictionaries, that *exscindere*, "to cut out," is also used in the sense of "to tear," and Cicero uses the phrase "exscindere epistolam" (which is remarkable), with regard to the destruction of a document. But it is unnecessary to enter further into the consideration of this point, for, consistently with the true construction of the Act of Parliament, and the decision of the learned judges of the Court of Queen's Bench, it is not necessary, in order to bring the act within the meaning of the words "otherwise destroying," that the material of the bill should be destroyed; it is sufficient, as it appears to me, if the essence of the instrument (not the material) be destroyed. Suppose a will to be written in pencil, and the words were removed by means of Indian rubber; could there be any doubt that that would be a sufficient revocation? Cutting is a mode of destroying as effectual as tearing, and it appears to me that if tearing a will to this extent be a sufficient destruction of it, the same effect must be attributed to the act of cutting it; what would be the consequences of a different construction? Suppose a will were torn into two or more pieces, the will, no doubt, would be revoked; but if it were cut into twenty pieces with a knife, that would be no revocation, and if the pieces could be collected and pasted together, the will must be pronounced for by the court. I cannot conceive it possible that it was the intention of the Legislature to leave the law in that state. The question then comes to this: whether this be or be not a destruction of the will. I consider the name of the testator to be essential to the existence of a will, and that if that name be removed, the essential part of the will is removed and the will is destroyed; otherwise the Statute does certainly not deserve the title it bears, namely, "An Act to amend the Laws with respect to Wills."

It was said in the argument (perhaps it is not very material) that a will cannot now be revoked by obliteration, the term obliteration having been advisedly omitted by the Legislature; but I am not prepared to say (although I now merely throw this out) that a will may not be revoked in that way, for I see no reason why, if the obliteration amount to a destruction of the will (that is, if the name of the testator, which is essential to a will, be so obliterated that it cannot be made out), a will may not be revoked in that way as well as any other. Suppose a testator had so obliterated his name from a will as to render it impossible to make it out, and I am not at liberty to supply it by evidence *aliunde*, how would this operate with respect to the 21st clause of the Act, which enacts, "that no obliteration, interlineation, or other alteration, made in any will after the execution thereof shall be valid, or have any effect, except so far as the words, or effect of the will before such alteration,

shall not be apparent"? By this clause, as I understand it, where words are so obliterated that they do not appear, it is a good revocation *pro tanto*. Would not the same rule be applied with respect to the name of the testator? I think that it was the intention of the Legislature that it should be sufficient if the name of the testator was so obliterated that it could not be made out: it never could be intended that a testator might revoke his will *pro tanto*, and yet not be at liberty to revoke the whole will.

Lushington. What does the court say as to the names of the two witnesses? By a parity of reasoning there would be a revocation by the obliteration of the names of the attesting witnesses.

Sir Herbert Jenner. I think so too; and if any such case should occur, I should think that if the names of the attesting witnesses were erased by the testator *animo revocandi*, it would be a sufficient revocation. It might be difficult to make it appear that the names of the witnesses were erased *animo revocandi;* but if it could appear, I should be of opinion that it would amount to a destruction of the will, within the meaning of the Act of Parliament. I do not think that the words "*otherwise destroying*" mean that the material of the will must be destroyed, but that it must be something which would amount to a destruction of the will itself.

I am then of opinion that the 34th section of the Act of Parliament did not exempt the deceased in this case from the necessity of complying with the requisites of the Act, as to the manner in which this will was to be revoked; and secondly, that the act done to the will (the excision of the name) amounts to a destruction of the will within the meaning of the Statute.

With respect to the further point, whether the excision of the name was intended only as a revocation, upon a new will being duly executed, I am of opinion that the case of *Onions* v. *Tyrer*, 1 P. Wms. 345, referred to in the argument, does not apply to the circumstances of this case, because in that case the deceased believed that the last will was a valid will, and on that supposition he proceeded to annul the former will; while in the present case, it is pleaded in the allegation that the deceased knew that two witnesses were necessary to the due execution of a will, and therefore that the paper before the court could not have any effect.

The court rejects the allegation.[1]

[1] In *Goods of Morton*, 12 P. D. 141 (1887), the signatures of the testatrix and of the attesting witnesses were "scratched out as if with a penknife." Butt, J., held that the will was revoked. He said, "What the testatrix did, may be regarded as a lateral cutting out. The paper is not pierced, but the signatures are scratched away."

PRICE *v.* POWELL.

EXCHEQUER. 1858.

[*Reported* 3 *H. & N.* 341.]

POLLOCK, C. B.[1] This was an action of ejectment brought by the heir at law against the devisee under a will.

The cause was tried before *Mr. Justice Crowder* at the Summer Assizes for Brecon, when a verdict was found for the plaintiff, with liberty for the defendant to move to enter a nonsuit or verdict for the defendant, on the ground that the act done by the testator in order to revoke his will was not sufficient within 1 Vict. *c.* 26, § 20. *Mr. Grove* accordingly obtained a rule for that purpose in Michaelmas Term. Cause was shown on the 10th and 11th of February at the sittings out of term. But as the court was not then full, and the question turns upon the meaning of the new Statute of Wills on the subject of a revocation, and the language of the 20th section of the 1 Vict. *c.* 26, differs from that of the 6th section of the Statute of Frauds, and is to receive a judicial construction as to this (we believe) for the first time; the court directed a second argument, which took place on Saturday last.

At the trial the jury found that it was the intention of the testator to revoke his will, and what he did was with that object. The will itself was on one sheet of paper, forming two leaves with four pages, and was executed in this form: "And in witness hereof I have to this my last will and testament, contained in four pages, set my hand and seal, that is to say, to the first three pages hereof I have set my hand, and to the last page I have set my hand and seal: this, &c. CHARLES PRICE. (L. S.)" And the attestation stated it to be "signed, *sealed*, published," &c. The testator in order to revoke it tore off the seal, tearing with the third leaf (on which in the fourth page the seal was placed) a similar portion of the first leaf on which were the letters "ral," being the final syllable of the word "funeral." The question is, whether this was a sufficient "tearing" within the meaning of the 20th section of the 1 Vict. *c.* 26, the words of which are — "by burning, tearing, or *otherwise destroying* the same" (*i. e.* the will). It was admitted that the word "destroying" did not import physical destruction; but Mr. Grove contended that the change of expression in the new Statute ("*cancelling and obliterating*" being left out, and "otherwise destroying" being introduced instead) imports that some act must be done so far destroying the will as to raise in itself a presumption (independent of other evidence) of an intention to revoke, and that merely tearing off the seal is not such an act, inasmuch as a seal is not at all essential to a will.

[1] The opinion only is given.

Very little assistance is to be derived from the previous cases in construing the altered expression in the Statute. There can be no doubt that prior to the new Statute a will found in the testator's possession with the seal torn off was deemed to have been cancelled: *Davies* v. *Davies*, 1 Lee Eccl. Rep. 444; *Lambell* v. *Lambell*, 3 Hagg. 568. At that time any tearing done with the intention of revoking had been held sufficient. The expression upon which we have now to put a construction is "by tearing or otherwise destroying;" and as it was admitted (and we think could not be denied) that actual destruction was not necessary, it becomes a question of degree, whether what was done in this case was sufficient; and in such cases, and indeed in all similar cases, we think it would be discreet not to lay down any general rule applicable to cases and circumstances which have not been the subject of argument before us, but to confine our judgment to the case at bar. And in our opinion as this will professed to be executed under seal, and was published and attested as a sealed instrument, when the seal was torn off it ceased to be the instrument which the testator professed to execute and to publish to the attesting witnesses, and through them to the world. It was, to use the expression of Mr. Justice Coleridge in *Doe d. Rees* v. *Harris*, 6 A. & E. 209, "destroyed in its entirety," and ceased to be (by means of tearing) the instrument as and for which it had been published. We are therefore of opinion that the act of tearing in this case was sufficient, and that the will was thereby revoked, and the rule to enter a nonsuit or verdict for the defendant must be discharged.

Rule discharged.[1]

Mellish, *Hugh Hill*, *T. Allen*, and *G. B. Hughes*, for the plaintiff.
Grove, *Giffard*, and *Bowen*, for the defendant.

SCOTT *v.* SCOTT.

COURT OF PROBATE. 1859.

[*Reported* 1 *Sw. & Tr.* 258.]

THE deceased in this case died on the 6th of December, 1857, having duly executed a will dated the 21st of February, 1852 (appointing his brother, John Scott, executor), and a codicil, dated the 25th of May, 1854. On the 20th of August, 1857, the deceased signed his name to a document, purporting to revoke this will and codicil. After he had executed this document, a suggestion was made to him that he might burn the previous will and codicil, inasmuch as he had made a new one, when he observed, "I suppose there is no use in keeping the old ones, as I have made a new one;" and accordingly burned them. It subsequently turned out that the document, dated the 20th of August, 1857, was not duly executed. A declaration was filed, propounding

[1] See *Williams* v. *Tyley*, H. R. V. Johns. 530 (1858).

copies of the will dated the 21st of February, 1852, and the codicil dated the 25th of May, 1854; but inasmuch as the facts of the case were not disputed, both parties agreed to take the opinion of the court, on motion, and that the costs should come out of the estate.

Dr. Addams, Q. C., on the part of the plaintiff.

Dr. Deane, Q. C., for the parties interested in an intestacy.

Sir C. Cresswell. The construction put upon this transaction by Dr. Addams is, I think, the correct one. There is no reason to doubt the truth of the affidavit. I must take the fact to be that the deceased having, as he supposed, duly executed a second will, said, "Now I have executed this will, the former will and codicil are of no use;" and destroyed them. He intended only to destroy the first will in substituting another for it. The first will and codicil, therefore, are entitled to probate.[1]

BLACK *v.* JOBLING.

Court of Probate. 1869.

[*Reported L. R.* 1 *P. & D.* 685.]

Lord Penzance.[2] In this case the deceased had executed several wills; but at the time of his death no valid will was found. In the hands of a legatee, however, was a document which purported to be a codicil, and is dated October 19th, 1867. It recites that the deceased had already bequeathed to his grandchildren the lease, stock, and profits, with everything relating to the farm of Fenham Hill, and gives in addition to each of them £300. The question is, whether this paper can be admitted to proof. It speaks of a bequest of a certain farm, which is contained not in any will of the deceased, but in a deed of gift executed by him on the 25th of May, 1867. The general proposition in relation to codicils is, that a codicil stands or falls with the will to which it belongs. This general proposition is subject to certain exceptions, and my first consideration will be, What were the exceptions under the old law? The result of my inquiry into this matter is very unsatisfactory. The first case reported is that of *Barrow* v. *Barrow and Others*, 2 Phillim. t. Lee, 335. The deceased in that case had executed a will and codicil. By the codicil he gave the residue of his property to his wife. He then burned his will. The court said, "As to the codicil it was clear that by the law of England it was not destroyed by the burning of the will, but was a substantive instrument or testamentary schedule, and as in this case the testator intended to die testate, considered it as his will, and declared he intended his wife should have almost all, agreeably to the codicil, I pronounced for the validity of it as a testamentary disposition." And yet, in that case,

[1] See *Dancer* v. *Crabb*, L. R. 3 P. & D. 98 (1873).

[2] Only the opinion is here printed.

the codicil only disposed of the residue, and it was not possible to ascertain the extent of the term "residue" without the will. The next case was *Medlycott* v. *Assheton*, 2 Add. 229, in which the deceased executed a will and codicil. By the codicil she gave £100 each to two trustees named in her will, and divided some trinkets amongst her family. She afterwards ordered the will to be destroyed, which was done, but she preserved the codicil uncancelled, and it was found in her writing-desk. Sir G. Nicholl said, "A codicil is *prima facie* dependent on the will; and the cancellation of the will is an implied revocation of the codicil. But there have been cases, where the codicil has appeared so independent of and unconnected with the will, that under the circumstances the codicil has been established though the will has been held invalid. It is a question altogether of intention, consequently the legal presumption in this case may be repelled merely by showing that the testatrix intended the codicil to operate, notwithstanding the revocation of the will. In my judgment, however, the circumstances of this case are not sufficient to establish such an intention in order to repel the legal presumption." In *Tagart and Bakewell* v. *Hooper*, 1 Curt. 289, the codicil was headed, "This is a codicil to my last will, and to be taken as a part thereof." Sir H. Jenner, in pronouncing for its validity, said, "In all the cases referred to, there were circumstances which showed that the codicils were dependent upon the wills; there is nothing here to show that the codicil was contingent upon the existence of the will." The court, therefore, in this case, suggests a presumption contrary to that raised in the other cases; for it decides that, to make the codicil invalid, there must be proof that it was intended to be dependent on the will. The consideration of these cases leaves upon the mind no very definite idea of what is meant by "dependent on the will." In one sense any codicil that makes any disposition of property at all, must be considered to be dependent on the will, which disposes of the rest, for the codicil conveys only a part of the testator's intention regarding his property, and the motives inducing that particular part of his intention cannot with any certainty be dissevered from the motives which induced the disposition of the rest. It is difficult, if not impossible, to predicate of a particular bequest in a codicil that the testator would have made it if he had disposed of his other property in any different manner than that expressed by his will. It may be that the independence of the will spoken of is something of a more limited character; and the meaning of the cases may be that a codicil is independent of a will, unless it is of such a character that the giving validity and effect to it, without the will to which it was intended to be attached, would produce some manifest absurdity. I am not sure that even this rule is capable of being easily applied to all the cases that might arise, and I have serious doubts whether such a rule is to be gathered from the cases with sufficient distinctness to justify the court in adopting it. But all these cases occurred before the Wills Act. Now the 20th section of

that Act is most distinct and positive in its terms. "No will or codicil or any part thereof shall be revoked otherwise than as aforesaid, or by another will or codicil executed in the manner hereinbefore required, or by some writing declaring an intention to revoke the same, . . . or by the burning, tearing, or otherwise destroying the same by the testator . . . with the intention of revoking the same." And I should have had no hesitation in holding that the intention of that section was to do away with all these implied revocations, and relieve the subject from the doubt and indistinctness in which the cases had involved it. But there have been two cases decided since the Act. The first was *Clogstoun* v. *Walcott and Others*, 5 N. C. 623, in which the only observation bearing on this point, made by Sir H. J. Fust, was, "Under the old law the effect of destroying a will was, by presumption, to defeat the operation of the codicils to that will; but by the present law, there must be an intention to destroy." The other was the case of *Grimwood* v. *Cozens and Others*, 2 Sw. & Tr. 364, in which Sir C. Cresswell said, "I think it has been established by the cases cited at the bar, that previous to the passing of 1 Vict. *c.* 26, a codicil was *prima facie* dependent on the will, and that the destruction of the latter was an implied revocation of the former; and, moreover, that Sir H. J. Fust was of opinion that no alteration of this principle was made by the passing of the Statute. The question then is entirely one of the intention of the deceased. Where a will and codicil have been in existence, and the will is afterwards revoked, it must be shown by the party applying for the probate of the codicil alone, that it was intended that it should operate separately from the will, otherwise it will be presumed that, as the will is destroyed, the codicil is also revoked." Now, in reviewing these decisions, I cannot perceive that the effect of the Statute has been fully considered by the court. Sir C. Cresswell seems to have thought that it had been decided that the Statute made no difference, and passed it by as having been so decided; and Sir H. J. Fust dismissed the point without any reasoning whatever, merely affirming that the Statute had made it necessary that there should be an affirmative intention to revoke. But the Statute says nothing of the kind, and unless it makes an actual revocation necessary, it does not interfere with the existing law at all. In this unsatisfactory state of the decisions, I think I shall do best in such a case as the present by adhering to the Statute, and by holding that as this codicil has never been revoked in any of the modes indicated by the Statute as the only modes by which a codicil is to be revoked, it remains of full force and effect, and is entitled to be admitted to proof.[1]

Dr. Deane, Q. C., and *Pritchard*, appeared for the plaintiff.
Staveley Hill, Q. C., and *Dr. Tristram*, for the defendant.

[1] See, *accord.*, *Goods of Savage*, L. R. 2 P. & D. 78 (1870); *Goods of Turner*, L. R. 2 P. & D. 403 (1872); *Gardiner* v. *Courthope*, 12 P. D. 14 (1886). *Contra*, *Sugden* v. *St. Leonards*, 1 P. D. 154, 206 (1876). See *Goods of Bleckley*, 8 P. D. 169 (1883).

SWINTON *v.* BAILEY.

HOUSE OF LORDS. 1878.

[*Reported* 4 *Ap. Cas.* 70.]

THIS was an appeal against a decision of the Court of Appeal, which had reversed a previous judgment of the Exchequer Division.

On the 16th of November, 1826, one Joseph Ely (or Eley), of the county of Lincoln, made his will, which recited that he was seised in fee simple of certain land in the parish of Kyme in that county, and that he was desirous in case of his death to make a provision for his mother, Elizabeth Ely, and he gave the said lands, &c., to his mother "to hold unto her, the said Elizabeth Ely, her heirs and assigns forever." He bequeathed to her also his personal property, and made her his executrix. The will was attested by three witnesses, and the attestation clause formally noticed two interlineations, — the word "simple" after the word "fee," and the word "other" in the clause revoking all *other* wills. There was, however, an obliteration which the attestation clause did not notice. In the body of the will the following words in the gift to the mother, "Ely, her heirs and assigns forever," had been struck through with a pen, but the obliteration being more extensive than was intended, the word "Ely" had been re-introduced, and the gift read thus, "to hold to my said mother Elizabeth Ely," the other words continuing obliterated. The testator died in April, 1836, and his mother proved the will. There was no direct evidence relating to the making of the obliterations. But when the will was propounded for probate, on the 17th of June, 1836, Elizabeth Ely made an affidavit, stating that on the death of the testator she made search for the will and found it, and observed the erasures, and she swore that the will as then produced was in the same state as when she found it. Probate was granted to her, and she entered into possession of the property. On the 14th of December, 1853, she made a will devising all her real estate whatsoever and wheresoever to her nephew, Jacob Swinton (the father of the appellant), in fee simple. Elizabeth Ely died on the 11th of October, 1859, and on the 14th of November, 1859, the respondents (claiming as co-heiresses-at-law of Joseph Ely) brought an action of ejectment against Jacob Swinton to recover possession of the premises. He at first defended the action, but then withdrew, and the plaintiffs in the action had possession delivered to them. On the 1st of February, 1875, the present appellant, as the heir-at-law of the devisee Jacob Swinton, brought ejectment against the present respondents to recover possession. The cause was tried on the 17th of March, 1875, before *Mr. Justice Brett*, without a jury. A verdict was entered for the now respondents, but leave was reserved to the appellant to move to enter it for him. A rule was accordingly

obtained, and on the 18th of November, 1875, judgment in the Exchequer was delivered in favor of the appellant. The case was taken to the Court of Appeal, and on the 2d of February, 1876, that judgment was reversed. 1 Ex. D. 110. This appeal was then brought. In consequence of proceedings in the court below, it was here taken as established that the alterations and erasures had been made by the testator himself.

Mr. Benjamin, Q. C., and *Mr. T. R. Bennett* (*Mr. Biale* was with them), for the appellant.

Mr. Wills, Q. C., and *Mr. Mellor*, Q. C. (*Mr. Dunning* was with them), for the respondents.

The Lord Chancellor. (Earl Cairns.) My Lords, this is the case of a will fifty years old, the will having been made on the 15th of November, 1826. The question is important, no doubt, to the parties in the present case, but it is not of any very extended importance with reference to other wills.

The will is that of a testator of the name of Joseph Ely, who appears to have been resident in the county of Lincoln. As the will originally stood it ran thus: [His Lordship here read the words of the devise].

Subsequently (as it must now be taken) to the execution of this will, an obliteration was made in it; and it must also be taken, for the purpose of the present appeal, that that was an obliteration made by the testator himself. The obliterations consisted in this: In the devise of the real estate, after the word "Elizabeth" the testator struck out "Ely" ("Ely" evidently having been struck out by mistake, for he restored it; but that makes no difference); and he also struck out the words "her heirs and assigns forever." In the bequest of personalty also, after "Elizabeth Ely," the words "her executors, administrators, and assigns absolutely," are struck out. I refer to that, because I think it not unimportant in reference to the first observation which arises on the matter.

Now, my Lords, I think you cannot for one moment doubt that, putting aside all legislation upon the subject, looking to the character of the obliteration which was here made, and to the fact (which must be taken to be admitted) that it was done by the testator, this was an alteration made deliberately with a set purpose, having reference both to the real and to the personal estate, and operating or being intended to operate in the same way with regard to both. I do not stop to consider whether it had the same operation upon the personalty as it had upon the realty; probably it had not. But it is obvious that the person who made the obliteration desired to remove, in the one case and in the other, the limitation of the words which had been superadded to the name "Elizabeth Ely," the words with regard to the real estate being "her heirs and assigns forever," and with regard to the personalty, "her executors, administrators, and assigns absolutely." That it was done therefore, putting aside the question of statutory

enactment, *animo revocandi*, there cannot, I think, be any doubt whatever.

That, my Lords, being the state of the facts of the case, what is the legislation which it is necessary for your Lordships to look at upon the subject? Was this obliteration effectual with regard to the real estate to alter the devise, so that whereas Elizabeth Ely, under the will as it originally stood would have an estate in fee simple absolutely, under the will as obliterated she would have only an estate for life? Now, my Lords, the Statute which has to be looked to with reference to that question is the Statute of Frauds. The 6th section of the Statute of Frauds consists of two parts, and I will, in the first instance, read the first part of it: [His Lordship read it]. That is the first part of the section. The second part is put in apposition to the first, and, as I took the liberty of suggesting during the argument, it seems to me to be inserted for the purpose of constituting an equilibrium between the two portions of the enactment. It runs thus: [His Lordship read it].

My Lords, I think that, in reality, your Lordships need apply your attention to no more than the first half of the section, because it must be obvious that the object of the Legislature was, in the second part, merely to declare affirmatively the consequence which resulted from the first part. The reference to the first part of the section, by the use, in the second part, of the words "in manner aforesaid," shows that it was not intended by the second part to cut down whatever might be the operation of the first. Now the first part is expressed negatively, but involved in it there is really an affirmative enactment. The Statute of Frauds had provided that there should be no will, devising lands validly, unless it was executed and attested in a particular way; but, then, a will being valid under the first part of the Statute, there is, in this section, a provision as to revocation; and I take the first part of the 6th section to enact, in substance, this: "That a devise in writing of lands, and any clause thereof, shall be revocable by burning, cancelling, tearing, or obliterating the same by the testator himself," that is, by burning, cancelling, tearing, or obliterating the devise, or any clause thereof. And inasmuch as you have the words "burning" and "cancelling," which apply to a material object, you obtain from that the obvious proof that "devise" must mean the will, the written paper executed in the manner provided by the Statute.

The enactment therefore is that the will may be revoked, and any clause in the will may be revoked, by burning, cancelling, tearing, or obliterating the same, or by another writing executed in the manner provided by the Statute. Those are the two ways in which a revocation may take place. Of course, from the very nature of things, those two ways are not co-extensive. You will of course be able, by means of a fresh writing, to produce results much more extensive than you can produce by cancelling or obliterating; but where you can produce results which are intelligible by cancelling or obliterating, the Statute allows you

to do it; where you cannot attain the end and object which you have in view by cancelling or obliterating, you must resort to the larger and higher means of making another writing. Of course you may by the other writing produce every result that you can produce by cancelling or obliterating; but it does not follow that by cancelling or obliterating you can produce every result that you can produce by a different writing. The one is a lower form, a lower power of alteration than the other; the other, that is to say the fresh writing, is the higher power.

That, my Lords, being the scheme of the Statute, let me apply it to what is done in the present case. You have here a devise "to Elizabeth Ely, her heirs and assigns, forever," and the testator obliterates the words "her heirs and assigns forever" (I overlook the obliteration of the surname "Ely," as it is immaterial), leaving it to stand a devise to Elizabeth Ely; so that she takes under a devise which does not go beyond her own life, and does not pass to heirs. Now, I ask in the first place, Why is that not within the Statute? The Statute speaks of any clause in the devise, (which I take to mean in the will,) being obliterated by the testator. Are the words "her heirs and assigns forever" not a clause in the will? Why not? It has been suggested that a clause must mean something self-contained, and independent, which when presented on paper would have a meaning by itself, without reference to the context. I do not know any law which says that that is the necessary meaning of the word "clause." When I read an enactment speaking of a devise, that is to say, speaking of a will or any clause in a will, I naturally infer that the word "clause" there means some collocation of words in the will which, when removed out of the will, will leave the rest of the will intelligible. I know no rule which says that the clause itself must be capable of being read as a document by itself if taken alone. The main object is to see if that which you obliterate, which you claim the right to obliterate *de jure* under the Statute, is something in the first place which you can obliterate *de facto;* because if the obliteration cannot be made *de facto*, then of course the Statute allowing it to be made must be inoperative. Now in this instance, *de facto*, the obliteration can be made. If you strike out the words "her heirs and assigns forever," the will reads as accurately as the most skilful conveyancer could have worded it. It is complete and perfect in every point.

Then, my Lords, is there any decision which says that the word "clause" must be taken in the limited sense which is assigned to it? I know of none. On the contrary, when I look to the cases which have been referred to, viz., *Larkins* v. *Larkins*, 3 B. & P. 16, 109, and *Short* v. *Smith*, 4 East, 419, it appears to me that in those cases no such meaning was supposed to be attached or to be attachable to the word "clause."

But, my Lords, I must go farther. I must say that if we are to resort to first principles, and to a technical examination of the character of the words which are here obliterated, as I understand the rule

of law it is, that where you have a devise "to A. B. and to his heirs and assigns forever," in the eye of the law that is a devise to A. B., and a devise to his heirs and assigns forever. The law says what the words say, — that you have there a devise to all of those persons. No doubt the law goes on to say that where you have a devise made in that way the ancestor shall have the dispositive power over the whole fee simple; but that is for the reason that you have got the devise to the heirs *ad infinitum*, and the devise cannot have effect given to it in any other way except by treating the words as words of limitation.

Therefore, whether I look to the words of the Statute, to what must be the popular meaning (having regard to the Statute) of the term "clause," or whether I look to the legal signification of the devise to the heirs of Elizabeth Ely, in the one case, and in the other, I find that there is something which in my judgment can be removed out of the will by obliteration, something which, when obliterated, is revoked, something which the testator, having written, desires to recall, and which he is allowed to recall, and to treat as *pro non scripto* by the process of obliteration provided for by the Statute.

My Lords, I therefore am clearly of opinion that the conclusion arrived at by the Court of Appeal in this case was a correct one; that the striking out of the words was justified by the Statute; and that the will for the purposes of the devise is to be read as if those words had never been included in it.

I therefore submit to your Lordships that the appeal should be dismissed, with costs.

Lord Penzance. My Lords, the question in this case turns entirely upon the meaning of the sixth section of the Statute of Frauds; and I agree with what has just been said, that although the form of the section is negative yet it contains within it an affirmative proposition. I read the earlier part of the section as being a power conceded to a testator to revoke by cancelling, burning, obliterating, or by another writing properly executed, some portion, at least, of his testamentary disposition. Now, in considering to what extent that power was intended to be given, of course we must have regard to the precise words of the section. It would run in the affirmative form in this way: "Any devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall, at any time after a certain date, be revocable by any other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or by others in his presence and by his directions and consent." Now, to begin with, what is the meaning of the word "devise"? The previous section says that all devises of lands "shall be in writing and signed by the party so devising the same;" and then the sixth section speaks of "a devise in writing of lands, tenements, or hereditaments." I understand by that language that the meaning of the word "devise" is those words reduced into writing which carry with them a disposition of land. "Devise" does not mean the whole will, because there may be many

other things in the will that have nothing to do with the devising of lands; but it means that group or collocation of words reduced into writing which operates as a disposition of the testator's lands. Now this section obviously gives a power to revoke any such devise when it has been made, by burning, cancelling, tearing, or obliterating those words, and if the whole of such words were obliterated it would entirely revoke the devise. It further gives the testator power to revoke the devise "by some other will or codicil in writing" (that is, a complete will or codicil) "or other writing declaring the same." Declaring what? Why, declaring that he had revoked or intended to revoke the devise. So far no one would dispute the construction of the section.

But, my Lords, in addition to that a power is conferred upon the testator to revoke "any clause" of his devise. Now, what is the meaning of those words? My Lords, I have read with great attention and care the decision of the learned judges in the Court of Exchequer, and I find that the learned Lord Chief Baron has considered that the words, "any clause thereof," that is to say, any clause of the devise, necessarily mean words which contain within themselves a devise; because he says in express terms, "It is the entire devise and bequest, and must remain in force until cancelled in the manner pointed out by the Statute." Then he refers to the cases, and then he says, speaking of the case of *Larkins* v. *Larkins*, "There, was a complete devise as regarded those two persons, and the alteration operated as to what was struck out; it was a complete revocation as to that particular trustee, and, if so, it comes within the words;" that is to say, he looks upon the case of *Larkins* v. *Larkins* in this light: he says that although it was one sentence, yet it really contained within it two complete devises; and, inasmuch as the one name was struck out, it was within this clause of the Statute of Frauds, because the striking out operated as a complete revocation of that entire devise.

Therefore, my Lords, it seems to me that the learned judge whose judgment I have been reading considered that in order to bring a case within this section of the Act of Parliament it was necessary that the thing which was struck out, and which was to be revoked, should be a set of words containing a complete devise. But it is obvious that it was not necessary for the learned counsel for the appellant in your Lordships' House to go so far as that, and I do not think he did go so far; he was content to take his stand upon a narrower ground than that; he said that the words "the devise or any clause thereof" must mean some independent sentence, some set of words which have an independent meaning of their own without reference to any context; and he said that if there were such words as those, no doubt a testator might, either by another and properly executed instrument, or by striking his pen through them, get rid of and revoke such words. But, my Lords, I am not aware that there is anything in the Statute which justifies that interpretation. When you speak of a devise (meaning thereby what I have already suggested, viz., a set of words carrying with them

a disposition of lands) and when you say that it may be revoked in the whole, or that any clause thereof may be revoked, it seems to me to be putting a construction upon the Statute for which there is no warranty in the language, to say that that clause must be an independent sentence. One can easily see, by putting an illustration, that no reasonable object of the Legislature would be effected by such a mode of construction, because, as I think was put in the course of the argument, if in this case, instead of the words "her heirs and assigns forever," the sentence had stopped at the words "Elizabeth Ely," and then in a subsequent sentence it had run in this way: "And I further declare that after the death of my said mother the said property shall go to her heirs and assigns forever," you would have had an independent sentence, and there, according to the construction contended for, the devise might have been revoked in that respect without touching the rest of the will. My Lords, it is hardly conceivable that the Legislature intended in this section to make a distinction between two things that are identical in effect, the only difference between them being that in the one case the words which carry the devise, or carry the beneficial intention into effect, are to be found as portions of a larger sentence, whereas in the other case they form an independent sentence. One cannot see any reason for such a mode of legislation. If the intention was to allow a part of a devise to be revoked, there seems to me to be no object in confining the power so to revoke to cases in which the part to be revoked found a place in some independent sentence.

But, my Lords, upon this point of the matter, what say the cases that have been referred to? The two cases that have been cited appear to be the only cases that have arisen; which certainly is a very remarkable circumstance. The Statute of Frauds was not passed yesterday, and the thousands and thousands of wills which, since the passing of the Statute, have had words struck out of them, one would have thought would have given rise to this question, if the matter had been doubted. After all, only two cases have been produced to your Lordships' House in which the matter has in any way been raised. In both those cases, as I understand it, it was not doubted that you could get rid of a devise to A. B. by striking out the name A. B. But A. B. is not an independent sentence; it has no meaning in itself; a man's name standing alone without any context has no meaning whatever; it is no part of a testator's express disposition to use the word A. B. or the words "John Brown." It seems to me, therefore, that those cases, so far as they go, proceed upon the idea that the words "any clause thereof" are not to be confined to cases in which there is some entire independent sentence, which, standing alone and entirely free of context, has a meaning of its own.

But, my Lords, another matter has been touched upon. It is not necessary for the determination of this case, because here the effect of what has been done has not been in any way to increase, but on the

contrary, to decrease the interest that Elizabeth Ely took. But I confess that I have been wholly unable to appreciate the arguments which have been used elsewhere, and to some extent in this House, upon the question whether, supposing it to be established that this section of the Statute of Frauds really did give to the testator the power to revoke a portion of a devise, — that is to say, a portion of the words constituting a devise, — that power would cease to exist in a case where the effect of revoking a portion of the words used would be to increase, and not to diminish, the interest of the taker. If that construction is to be put upon the Statute, it ought, I think, to have some words from which that inference could be drawn. The Statute says, You may revoke a portion of those words constituting the devise if you like; but it says nothing about the effect. Of course it is easy enough to put hundreds of instances in which, as suggested by the Lord Chancellor, there having originally been the words "without impeachment of waste," a testator strikes his pen through them, and there is then an end of that disposition. Then another case may be put, perhaps rather in the opposite direction; where A. and B. are joint tenants or tenants in common. Whatever may be the restriction or qualification that is struck out, whether it may have a tendency to increase the benefit of the person in question or not, appears to me to be quite immaterial.

My Lords, the opposite idea, I think, is founded upon a view of the word "devise," which is contrary to what I have suggested to your Lordships as the proper view. As I understand, the idea involved in that argument is this: A devise is a gift; if a testator has made a gift to a man the Statute gives him power to revoke the gift or any part of it, and not only to revoke a part of the gift, but to give something more. Looked at in that light one understands the idea; but I venture to think that the word "devise" is not to be read in that way, but that a devise merely means a disposition of lands in words in writing, and that when you say that the testator may revoke "any clause thereof," that is, may revoke any portion of those words, it means any intelligible portion of those words, whether the effect is to increase the beneficial interest of the taker, or the reverse.

My Lords, I do not think that I need further discuss this matter. I am entirely of opinion that the judgment of the Court of Appeal gave the right construction to this section. The judgment in the Court of Exchequer appears to me to be far too narrow, because the result of it would be this: that if a man had made a devise in any form, and he wished to alter that devise without doing away with it, he could not do it at all except by a fresh will, that fresh will cancelling the first devise; he would have to make a new devise in the amended form that he might desire, and the power of obliterating and cancelling a portion, which was obviously intended by the words of the sixth section of the Statute of Frauds, would really come to nothing, because he could do nothing in the way of revocation except by revoking the whole and making a fresh disposition.

I am therefore of opinion that the judgment of the Court of Appeal ought to be affirmed.[1]

The Lord Chancellor. My Lords, I wish to say, in order to prevent misunderstanding, that the observations which I made to your Lordships were made only with reference to an obliteration which is a revocation in the proper sense of the term, that is to say, a cutting down or a taking away of something previously given. It is of course possible to conceive the case of an obliteration which might have the effect of enlarging that which before was given. Until a case of that kind arises, if it ever should arise, I wish to keep my judgment upon it altogether suspended.

Decree appealed against affirmed; and appeal dismissed, with costs.[2]

WARNER *v.* WARNER.

Supreme Court of Vermont. 1864.

[*Reported* 37 *Vt.* 356.]

This was an appeal from a decree of the Probate Court disallowing the will of Isaac Warner deceased, and was tried by the jury at the Chittenden County Court, April Term, 1863, *Pierpoint*, J., presiding, upon the plea, that the paper propounded was not the last will and testament of the said deceased.

The proponent introduced testimony tending to prove that two days before the death of said deceased, during his last sickness, he said to his wife (the proponent) that she would find in a trunk where he kept his papers, a will made out by him for her benefit; and that some three weeks after his death she examined the trunk and found among the papers the will in question, and that she thereupon presented the same to the Probate Court for probate. She also found there a former will with the testator's name partly torn off. The following facts were duly proved and not disputed, viz.: The paper propounded was dated August 22d, A. D. 1857. It was all in the handwriting of the deceased, except the names of the witnesses, and was folded and filed in the handwriting of the deceased, "Isaac Warner's last will and testament," and was in all respects duly executed, witnessed and published, at that date, as his last will and testament, he then being of sound disposing mind and memory. The deceased in the earlier part of his life was a practising lawyer in this State. He died at Burlington on the 11th day of August, 1861, aged 79 years, leaving no will of later date.

[1] The speech of Lord O'Hagan in concurrence is omitted.

[2] See *Esehbach* v. *Collins*, 61 Md. 478 (1883).

Under the New York Statute obliteration of a part of a will is not effective. *Lovell* v. *Quitman*, 88 N. Y. 377 (1882).

The contestants claimed that the deceased on the 15th day of March, 1859, cancelled said will with the intention of revoking it, and in support thereof offered to prove that the deceased at that date wrote on the same paper on which the will is written at the foot of the writing of the will, and on the back of the same paper, what appears there written, with the intention of revoking said will. This was objected to by the proponent, upon the ground that such writing was not such an act of cancelling as the law makes necessary for the revocation of a will, although the deceased might have done it with intent to revoke said will.

It appeared that the will was written upon a sheet of foolscap paper and covered the first page and about one third of the second page, and that thus far there were no marks of obliteration, cancellation, or defacement upon the paper. But upon the last half of the second page were written the following words: "This will is hereby cancelled and annulled. In full this 15th day of March in the year 1859," and several lines lower down upon the page are the following words, erased: —

"In testimony whereof I here I have."

Written lengthwise of the paper as folded, and below the filing of the paper upon the back, being the outside on fourth page, were these words: "Cancelled and is null and void. I. WARNER."

The court, against the objection of the proponent, admitted the testimony of one Charles F. Warner, which tended to prove that the testator intended the said writings upon the will as a revocation by cancelling, and that he first designed to make another will, but finally decided to make no will, but leave it to the law to divide his property.

Upon the testimony and facts proved, the proponent claimed, that the court should direct a verdict establishing the will. The court refused so to rule, and submitted the case to the jury. The proponent asked the court further to charge the jury upon several points presented, which the court declined to do.

The jury returned a verdict that said instrument was not the last will and testament of the said Isaac Warner deceased.

To the several rulings of the court, the refusal to charge as requested, and the charge as given, the proponent excepted.

Daniel Roberts, for the proponent.

Wm. G. Shaw and *E. J. Phelps*, for the contestants.

BARRETT, J. The main question in this case is, whether the will was revoked by the act of the testator, in writing what he did on the second page of the instrument.

The Statute prescribes the several and only modes in which a will, duly executed, may be revoked; viz.: 1st, by some will, codicil or other writing. 2d, by burning, tearing, cancelling or obliterating. It is clear, and is conceded, that this will is not revoked by either of the first of said modes; nor by either of the other modes, unless it be by *cancelling*. That is a mode by itself, different and distinct from burning or obliterating, though obliteration may in some cases be an

act of cancelling. In the present case there is no obliteration. So the only question is, Was the act of the testator a *cancelling*, within the meaning and intent of the Statute?

We regard it as a settled doctrine of the interpretation of Statutes, that when an English Statute is enacted in this State, if it had received a judicial interpretation in England prior to its enactment here, it is to be taken that the language is used in our Statutes in the sense given to it by the adjudications in England, unless there is some other sense impressed upon it by attendant provisions of the Statute thus enacted. But if it had received no such interpretation, it stands for interpretation here the same as if it had been first enacted here. Adjudications in England, made since such enactment here, have not the force of authority, as to the sense of the language as used in our law. As resting on reasons that commend themselves to our approbation, all adjudications upon the subject may aid in giving to terms used a just sense and effect, having reference to the subject-matter of, and to the purposes designed to be served by, the Statute in question.

It is plain that the object of the Statute 29 Car. II. is the same as that for which our similar Statute was enacted; and, in the matter of wills, to provide ample security against their revocation being effectuated, unless by means insuring the utmost certainty that it was the intent of the testator to revoke what would otherwise stand for, and be effectual as, a will disposing of his worldly effects.

To this intent, the provisions in this behalf have been made. The class of acts of revocation, of which cancelling constitutes one mode, contemplates something to be done to the instrument itself, showing, or tending to show, that, by such act, the testator designed to make an end of it as his will; and each of the modes prescribed was designed to be equally effectual in that respect. If the document should be entirely burned up, or entirely obliterated, or torn into scraps, or covered over with closely drawn cross lines, there would be no doubt as to the intent of the testator. But it has been held not to be necessary to go to that extent in any of the modes, in order to answer the requirements of the Statute; and that the slightest degree of either mode, provided it appear, even by resort to other evidence, that the act was done with the intent to have it constitute a revocation, is effectual as such revocation. Accordingly it has been decided that the slightest burning or tearing of the material on which the will was written, even though none of the script should be destroyed or effaced, — that the erasure of a single word, or the drawing of a slight line across the face of the script, partaking of the character of the act prescribed by the Statute, if it appear to have been done in the accomplishment of such act, effectuates a revocation.

Now it is obvious, from the general current of the cases early and late, that the leading idea is, that the testator must perform some one of the prescribed acts upon the instrument itself, so that, when produced, it shall bear the mark of such act. What amounts to burning,

to tearing, to obliterating, is not the subject of question. But what amounts to *cancelling*, — how, with reference to the text of the instrument, must the act be done, — not as to the shape or character of the marks, but *where* must they be located, is the main point of debate in the present case. The proponent claims that the cancelling marks must be made upon some part of the written text of the will.

The Latin verb, from which the term *cancel* is derived, means to make lattice work, and the corresponding noun in Latin, in the plural, *cancelli*, signifies lattice work; and when applied to marks, means marks made in the form of lattice work. How this term came to be applied to marks made upon written instruments, for the purpose of destroying their validity, is obvious both from general and judicial history, not only as taught by the books, but as derived from observation. To draw cross lines over the face of a written instrument has been, and is, a common mode of showing the intent, thereby, to make an end of it as an instrument in force. In earlier times, when the ability to write was possessed by very few, the great mass of persons of all grades from the highest lord to the lowest peasant, could manifest their intent, with pen and ink, only by unlettered marks. While they would be dependent on the few skilled in the art, to draw their instruments of contract in making disposition of their property, they could and did resort to various modes, by which, without *clerkly* aid, to make an end of their validity.

From the fact that cross marks were so easily made, and, when made upon the face of a written instrument, were so significant that, thereby, the maker of them designed to put an end to the continuing validity of the instrument, this mode was recognized and adopted into the Statute, in common with tearing, burning and obliterating, as one by which wills might be revoked. In some instances, this mode might be preferable to either of the others, as when it should be desirable to preserve the legibility of the entire instrument, which might not happen as the result of burning, tearing or obliterating. While, therefore, a common and customary mode of manifesting the intent to abrogate the instrument, by drawing cross lines over the face of it, gave rise to the use of the term *cancel*, still the entire judicial history of the subject shows that *that manner* of marking an instrument is by no means essential in order to answer to the full force and effect of the term in its *legal* sense. The net result of all the cases and all the text-books, as well as the reason of the thing, and the appropriate analogies, seems to be this, — that, when the instrument is so marked by the maker of it, as to show clearly, whenever it is produced, that the act was designed by him to be a *cancelling*, that act becomes effectual, by force of the Statute, as a revocation of the will by cancelling.

In the present case the act of the testator was done, not only upon the paper on which the will was written, but upon such a part of it as always to go with that part of the will which contained the disposition of the property, — not indeed on the face, but on the back of such dis-

position. It is obvious that the *act* itself was designed to constitute a revocation by *cancelling*. This is not a mere memorandum or declaration, which, as such, operates a legal effect by force of the terms, but it was the performing of an act upon the instrument itself, which act operates the legal effect. If cross lines had been drawn over the face of the writing of the will, they would have been effectual, because they would have constituted an act done to the instrument, showing the intent of the testator, by that act, to destroy the validity of it. Instead of thus drawing lines, he equally performed an act to the substance of the instrument, and as inseparable from the written text as cross lines over its face, showing, with even clearer certainty, the intent, by that act, to destroy its validity. Instead of leaving the significance of informal marks to be fixed by the location they occupy, he formed the marks into letters and words expressive of their significance, and as effectually placed them upon the instrument, as if they had been made upon the face of the script of the will. If he had drawn a slight mark from the top to the bottom of the writing, though that would not have been *cancelli*, within the etymological and primary meaning of the term, still it is conceded that it would have been a *cancelling* of the will, if done with that intent, within the legal meaning of that term. We think that writing upon the will, as was done in this case, as nearly answers to the primary sense of that term, as such mark would, and, having regard to the ground on which effect is given to an act of cancellation, such writing answers every reason and requisite of the law.

The case of *Lewis* v. *Lewis*, 2 W. & Serg. 455, comes nearer to a position of conflict with the view we hold, than any one to which attention has been called; yet its characterizing facts are so different from those of the case in hand, as, in our judgment, to relieve the two cases from any such conflict. In that case, the word "*obsolete*" was written by the testator on the margin, against a certain clause in the will. The court held that that did not, of itself, constitute a *cancelling*. There was no evidence, aside from what that word imported in that location, of the intention of the testator, as to the character and effect of the act of writing it. It was not a *cancellation* in the primary sense of the term, not being a *cross-marking* on the face of the writing. It was not in the wider sense accorded to it by the law, because it was not upon the writing at all, as and for a mark drawn over it. The word itself did not, in its position, indicate that the act of making it was designed to be an act of cancelling. It was so placed upon the paper that it might be separated and leave the written part of the will entire and intact. It might have been designed as a mere memorandum or declaration, to have effect as such, and not as the effectual fact which operates in virtue of the act of thus marking the instrument.

Several cases were cited in the argument, in which there had been erasures or interlineations, or both, and it was held that the wills were not thereby revoked, because it did not appear, on the one hand, to have been the intention of the testator to have the act constitute a

cancelling, or, on the other, if so intended, that the act was completed by the testator having done all that he designed to do as constituting such act of cancelling. Such are *Winsor et al.* v. *Pratt et als.*, 6 E. C. L. 299; *McPherson* v. *Clark*, 3 Bradf. 95; *Martins* v. *Gardner*, 8 Simons, 73; *Clark* v. *Smith*, 34 Barb. 140.

The ground and reason of those and similar decisions are well stated, and cases referred to in Redf. on Wills, 315; also in 2 Am. Lead. Cases, 692, where it is said, "Although interlineations, intended to vary the sense of the will, and not to destroy it, cannot, in themselves, amount to a cancellation, there is no room for doubt, that, when taken in connection with actual erasures, they may go to make up the proof of a change of disposing purpose, and show a total or partial revocation of the instrument." And this is fully sustained by the authorities cited.

There is a class of cases of revocation by burning, tearing, or obliterating, in which the principle and its application seem to us to be precisely the same that we adopt and make in this case. Primarily, and most naturally, the terms used imply as the idea of the law, that the burning or tearing is to be such as, virtually, to destroy the will as an instrument, and not merely enough to indicate, or be consistent with, an intent to abrogate it; and the same remark is equally applicable to a case of obliteration. Yet in *Avery* v. *Pixley*, 4 Mass. 460, it was held that taking off a seal, placed upon a will as a part of the act of executing the same, although the law did not require such seal, would operate a revocation by tearing, provided it was shown to have been done with that intent. So in *Moore* v. *De la Torre*, 1 Phillimore, 375, the will and codicil were cut around the margin at the top and one side, but no part of the writing was touched, except the attestation clause of the codicil was cut through. In this condition they were found in the room of the testatrix after her decease, in a box in which she had kept her papers; and on their being propounded for probate, Sir John Nichol, after a most elaborate argument, said: "It is the duty of the court to put a rational construction upon this act. In my judgment it must have been done for the purpose of cancelling, revoking and destroying the validity of this instrument. I can put no other rational construction on the act. It must have been done not equivocally, but decidedly, for the purpose of revoking the instrument." The case, on appeal, was fully and most learnedly argued in the High Court of Delegates, before seven most able jurists in this department of the law, and the judgment of the Prerogative Court was sustained. In *Bibb* v. *Thomas*, 2 W. Black. 1043, the will was so torn by the testator as almost to tear a bit off, and then rumpled together and thrown upon the fire, but it soon fell off, and was picked up by a servant, and preserved. By the whole court, De Grey, C. J. "Revocation is an act of the mind, which must be demonstrated by some outward and visible sign or symbol of revocation. The Statute has specified four of these; and if these, or any of them, are performed in the slightest manner, this, joined with the declared intent, will be a good revocation. It is

not necessary that the will or instrument itself be totally destroyed or consumed, burned or torn to pieces. The present case falls within two of the specified acts described by the Statute. It is both a burning and a tearing. Throwing it on the fire with an intent to burn, though it is only very slightly singed and falls off, is sufficient within the Statute." In *Reed* v. *Harris*, 33 E. C. L. 57, the doctrine of *Bibb* v. *Thomas* is fully asserted, but, in the last case, it was held that there must be an actual burning, to some extent, of the paper of the will. Patteson, J., said: "There must, at all events, be a partial burning of the instrument itself. I do not say that a quantity of words must be burned, but there must be a burning of the paper on which the will is." Similar cases, in which the same doctrine has been held, might be referred to; but such reference is needless, as there is no substantial conflict of decision.

Now, as before intimated, the acts of burning and tearing in the cases cited, are as far from answering to the most natural import of the words used in the Statute, as the act in the present case is from answering to the primary idea of making lattice work, or to the less restricted idea of drawing a cross, or even a single mark, on the face of the writing, in order to constitute cancelling.

On the whole, the true legal idea seems to be well expressed in 2 Am. Lead. Cases, 689, as follows: "All that is necessary to a revocation is an absolute revoking intention, manifested by any act, however slight in its nature, which can fairly be considered as a tearing, burning, cancelling, or obliterating, within the meaning of the Statute of Frauds, and the various legislative enactments which have been based upon it;" and in Williams on Executors, 110, that "the principle appears to have been established, that if the intention to revoke is apparent, an act of destruction or cancellation should carry such intention into effect, although not literally an effectual destruction or cancellation, provided the testator had completed all he designed to do for that purpose."

As to the extent to which such act of revocation must be done in order to be effectual, perhaps Mr. Justice Coleridge, in *Reed* v. *Harris*, *supra*, put as proper a general formulary as is to be found, or as can well be framed, thus: "The question is put whether the will must be destroyed wholly, or to what extent. It is hardly necessary to say; but there must be such an injury, with intent to revoke, as destroys the entirety of the will; because it may then be said that the instrument no longer exists as it was." This language was used with reference to burning or tearing, as a mode of revocation. Applying it to *cancelling*, "there must be such a marking, with intent to revoke, that it may be said that the instrument no longer exists as it was." In the present case, it would seem pretty palpable, that when the testator had written where he did, "this will is hereby cancelled and annulled in full this 15th day of March, 1857," the instrument no longer existed as it was.

Holding this to be sufficiently, in character, an act of *cancelling*, we proceed to remark, that the intent is so decisively manifested by it, as to give it full effect as an act of revocation. And we regard our brother Pierpoint as having most aptly expressed the true legal idea, when he said, in his charge to the jury, that "in the writing may be combined both an act and a declaration of intention."

Upon the face of the will, when produced, it was, in the eye of the law, cancelled; and the court would have been warranted in so ruling. This being so, the evidence that was received of the sayings of the testator, became immaterial, whether made at the time of the act of cancelling, or subsequently thereto. Hence it becomes unnecessary to decide whether the testimony, as to his sayings made subsequently to that act, would have been admissible as evidence of his intent in doing it, if it had been necessary for the defendant to show, *aliunde* the instrument, that the act was done with the intent to revoke the will by cancelling.

Some of the members of the court think the proponent had given occasion for the introduction of this evidence, by the character of the evidence which she had introduced in the opening of her case.

The only remaining question is, as to the republication claimed by the proponent to have been made by sayings of the testator a few days before his death.

The will was revoked by the act of cancelling. The law of this State, in cases like the present, recognizes as valid such wills as are made in the mode prescribed by the Statute, which Statute prescribes the only modes in which they may be revoked. When thus revoked, it would seem quite incongruous that the instrument could be restored to its original vitality and force by mere words, without any further act done upon, or with reference to, such instrument.

In cases like the present, we have no wills at, or by force of common or ecclesiastical law, but only by Statute. The substance of the 5th section of the Statute of Frauds, 29 Car. II. *c.* 3, was enacted as early as 1787 in this State; and in 1821 the full force of that section, as also of the 6th section, was extended to personal as well as to real estate, and the same has been substantially the law of this State ever since. Slade's St. *c.* 44, §§ 17, 18; G. S. *c.* 49, §§ 6, 7.

The case before us does not bring in question the effect of executing a codicil with due formalities, after the act of revocation, or of another testamentary instrument, referring to, and designed to restore the revoked instrument; nor does it bring in question other acts done to or upon the instrument itself subsequently to the act of revocation; nor does it involve, or call for any discussion of the subject in the light of the cases decided in other States in which the English law as to wills has existed to a greater or less extent. We are therefore relieved from the complications and conflicts which the books show to have often troubled other courts; and for the additional reason that the evidence, upon which the point as to republication is predicated, could only

bear upon the question of the intent of the testator in doing the act of revocation. The proponent had the full benefit of that evidence in that view, whether properly or not.

In the discussion and decision of this case, we have given no consideration to the act or words of the testator, in what he wrote upon the outside of the folded will under the filing.

The judgment is affirmed.[1]

BIGELOW *v.* GILLOTT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1877.

[*Reported* 123 *Mass.* 102.]

APPEAL from a decree of the Probate Court for the County of Suffolk, allowing a certain instrument, with the exception of the "sixth" and "thirteenth" clauses thereof, as the last will and testament of Thomas Liversidge, deceased. The will of the testator contained the following clauses: —

"Sixth. I give to my executors the sum of six thousand pounds sterling, in trust, to be used and appropriated by them for the purpose of paying the debts which my father, Stephen Liversidge, owed in the year eighteen hundred and twenty-nine, said payment to be made to the legal representatives of the persons who were his creditors at the time: and it is my will and I hereby direct, that the principal only of said debts shall be paid, excluding interest; the sum of six thousand pounds being, in my opinion, sufficient for this purpose. If any portion of said six thousand pounds shall remain after payment of said debts, such remainder is to belong to the residue of my estate, and to be disposed of accordingly by said trustees."

"Thirteenth. I give and bequeath to John Shufeldt, of Marshfield in the county of Plymouth, the use and improvement of the estate and farm belonging to me in said Marshfield, during the term of his natural life, on the condition that said Shufeldt shall pay all taxes and cost of insurance appertaining to said estate, and shall continue to live thereon and occupy and cultivate the estate."

(The nineteenth clause gave his homestead estate to trustees to maintain a charitable institution.)

"Twentieth. I give, bequeath and devise all the rest, residue and remainder of my estate of every description, of which I shall die seised and possessed, to said Eleazer J. Bispham, Frederic A. Wellington and George Tyler Bigelow, absolutely and forever, in trust, nevertheless, to be appropriated, used and applied for the maintenance and support of the institution named and described in the last preceding clause of this will."

[1] See *Evans's Appeal*, 58 Pa. 238 (1868).

The appellants, the heirs-at-law of the testator, filed certain reasons of appeal, the following being the only one relied on in this court: —

"That, it having clearly appeared by the evidence before the Probate Court that the obliterations in said paper writing were made subsequently to the execution thereof, as the last will and testament of the alleged testator, and that no re-execution took place after said obliterations were made, the Probate Court, as it decreed the probate of the will, excepting the sixth and thirteenth clauses, should also have decreed that the portion of the estate originally disposed of under said sixth and thirteenth clauses, remained undisposed of by the testator at the time of his death, and passed to his heirs-at-law."

Hearing before *Colt*, J., who found that the will was duly executed on or about the time of its date, in the manner required by law, by Thomas Liversidge, as and for his last will and testament, and that he was at the time of executing the same of full age and of sound mind; that in the will, as presented for probate, ink lines appeared, drawn probably with a pen, through and across each and every word constituting the clauses of the will, numbered respectively "sixth" and "thirteenth," leaving the words, however, legible; that the lines were drawn across the words by Liversidge in his lifetime, after the execution of the will by him as aforesaid; and, on all the evidence bearing upon the intention of the testator in making these erasures, and upon the inspection of the original will, found, if competent so to find, that the erasures were made by the testator with the intention of revoking the sixth and thirteenth clauses of his will, but with no intention of revoking or defeating the other provisions of his will.

The question whether the evidence before him, (which was annexed to the report,) together with the original will, justified this finding, as well as the question, what effect those acts of the testator might have upon the will and the probate of it, were reserved for the consideration of the full court.

L. S. Dabney, for the executors.

H. A. Johnson, for the appellants.

Morton, J. The presiding justice who heard this case has found as facts, that the testator erased the sixth and thirteenth clauses of his will after its execution, and that such erasures were made with the intention of revoking the said clauses, but with no intention of revoking or defeating the other provisions of the will. These findings were clearly justified by the evidence. We need not consider the evidence in detail, as the appellants do not contend that the findings were erroneous, the only questions raised by them being as to the legal effect of such erasures.

The Statute provides that "no will shall be revoked, unless by burning, tearing, cancelling or obliterating the same, with the intention of revoking it, by the testator himself, or by some person in his presence and by his direction; or by some other will, codicil or writing, signed, attested and subscribed, in the manner provided for making a will."

Gen. Sts. c. 92, § 11. This provision is a re-enactment of the Rev. Sts. c. 62, § 9, with merely unimportant verbal changes. The Rev. Sts. made material changes in the law as to wills, doing away with the distinctions between wills affecting real, and wills affecting personal, property, and putting all upon the same footing. The St. of 1783, c. 24, § 2, permitted the revocation of a devise of land, "or any clause thereof," in the manner pointed out in the Statute, which was the same manner now provided for the revocation of a will.

We see nothing to indicate that the Legislature, in the revision of 1836, intended to change the law in this respect and to limit the power of revocation to a revocation of the whole will. The power to revoke a will includes the power to revoke any part of it. If we were to hold that under this provision a testator could not revoke a part of a will by cancelling or obliterating it, we should be obliged by the same rule of construction to hold that he could not revoke a part by a codicil, which would be against the uniform practice in this Commonwealth, sanctioned by numerous decisions.

We are therefore of opinion that, in this case, the cancellation by the testator of the sixth and thirteenth clauses of his will, by drawing lines through them, with the intention of revoking them, was a legal revocation of those clauses.

The remaining question is as to the effect of this revocation upon the property affected by the revoked clauses. The appellants contend that the property devised and bequeathed therein is to be treated as intestate property, which goes to the heirs-at-law or distributees; and the executors and trustees contend that it passes to them under the residuary clause of the will.

It is a clearly settled rule of law that, in a will of personal property, a general residuary bequest carries to the residuary legatee all the personal property of the testator which is not otherwise disposed of by the will, including all lapsed legacies and all void legacies. And in this Commonwealth, since the passage of the Rev. Sts. in 1836, the same rule applies to wills of real estate. *Thayer* v. *Wellington*, 9 Allen, 283, and cases cited. It is true that if a special bequest in a will lapses or fails for any reason, the sum bequeathed will not pass to the residuary legatee if it appears from the will that it was the intention of the testator to exclude it from the residuary clause. In *Thayer* v. *Wellington, ubi supra*, the court say: "We take the rule to be that a general residuary clause passes all the estate of the testator not otherwise disposed of, unless it is manifestly contradictory to the declared purpose of the testator, as found in other parts of the will. There must be a clear intention that in no event it shall pass to the residuary devisee."

In this case, there is nothing to indicate an intention on the part of the testator that the property covered by the revoked clauses should not go to the residuary devisees. The residuary clause is expressed in the broadest terms. "I give, bequeath and devise all the rest, residue

and remainder of my estate of every description, of which I shall die seised and possessed." The intention of the testator is clear, to give all his property, not otherwise disposed of by the will, to the trustees named therein, for the support of the charity established by the nineteenth clause. He revoked the sixth and thirteenth clauses, and purposely and intelligently left the other provisions to stand as his will. The only fair inference is that he intended that the property covered by those clauses, and which by his revocation became undisposed of by the other clauses of the will, should fall within the residuary clause. We are of opinion that this case falls within the general rule, and that the property in question passes to the residuary devisees.

The argument of the appellants, that this view is in conflict with the provisions of law which require that a will disposing of property should be executed in the presence of three witnesses, is not sound. It is true that the act of revocation need not be done in the presence of witnesses; but such act does not dispose of the property. It is disposed of by the residuary clause, which is executed with all the formalities required in the execution of a testamentary disposition of property.

Decree of Probate Court affirmed.[1]

LADD'S WILL.

SUPREME COURT OF WISCONSIN. 1884.

[*Reported* 60 *Wis.* 187.]

APPEAL from the Circuit Court for Grant County.

The case is thus stated by *Mr. Justice Cassoday*: —

"It appears from the record and, in fact, is admitted by all parties and, in effect, found by the court, that the will of the testatrix was duly made, executed, attested, witnessed, published, and declared as a will, July 29, 1870, in the State of New York, but in strict conformity with

[1] In *Pringle* v. *M'Pherson*, 1 Brev. 279 (1809), a testator devised to his daughter Elizabeth, besides other property, "three hundred acres, being part of his Newton tract of land." He devised to his daughters Nancy and Susan all his Pon Pon plantations, "except the three hundred acres before devised to Elizabeth." He gave the residue of his estate, real and personal, to his wife and children. He afterwards scratched out with pen and ink, but leaving distinctly legible, the whole of the clause devising the three hundred acres to Elizabeth, and also the words making the exception to Elizabeth in the devise of the Pon Pon plantation. The above facts were found by special verdict, and the jury prayed the advice of the court whether the obliteration was a revocation of the devise to Elizabeth, and if it was, whether the three hundred acres passed to Nancy and Susan under the devise to them, or whether they passed under the residuary clause, or whether they went as land undisposed of. The Constitutional Court of South Carolina *held* that the testator intended to increase the shares of his daughters Nancy and Susan, that his attempt to do so was ineffectual, and that the devise to Elizabeth stood as if the obliteration had not taken effect.

our Statutes, and that the will is entitled to probate, if not revoked; that the paper upon which the will was written was a very large, thick, double sheet, the first page of which was originally a printed blank form of a will, the blanks of which were filled up with the writing; that the written and printed parts constituting the will were wholly upon the first page; that nothing was written or printed upon the second or third page of the sheet, — they being entirely blank; that the usual indorsement by the scrivener was upon the fourth or outside page of the wrapper leaf, and upon which there was also written in pencil, in the handwriting of the testatrix, the words: '*I revoke this will. Mary P. Ladd, October 7, 1879.*'

"October 7, 1882, the testatrix died, in Grant county, Wisconsin, where she then, and for several years had, had her residence and domicile. The testatrix retained the will until her death, when it was found in the bottom of her trunk, tied up with her decree of divorce, and covered with a newspaper. The Circuit Court, affirming the decision of the County Court, held that the will was revoked by the writing in pencil, and judgment was entered accordingly."

From that judgment Arthur Sherman, the proponent and one of the residuary legatees under the will, appealed.

Wm. E. Carter and *A. R. Bushnell,* for the appellant.

J. T. Mills and *John G. Clark*, for the respondent.

CASSODAY, J. The frauds incident to allowing written wills to be set aside by parol testimony finally culminated more than two hundred years ago in the trial of the feigned issue in *Cole* v. *Mordaunt*, where it appeared at the bar of the King's Bench that most of the nine witnesses against the will were guilty of deliberate perjury, and that the widow who sought to set aside the will was guilty of subornation of perjury. On a petition for a review of the case, Lord Chancellor Nottingham remarked that "he hoped to see one day a law that no written will should ever be revoked but by writing." See notes to *Mathews* v. *Warner*, 4 Ves. Jr. 196; *Prince* v. *Hazelton*, 20 Johns. 513. This remark and that trial led to the enactment of the Statute of 29 Chas. II., "for the prevention of frauds and perjuries," in the following year. 3 St. at Large, p. 385, ch. 3. In fact, the eminent father of equity himself introduced the bill, as he afterwards stated in *Ash* v. *Abdy*, 3 Swanst. 664; 4 Lives Ld. Ch. 271.

Section 6 of that chapter prescribed the manner in which a "devise in writing of lands, tenements, or hereditaments," or "any clause thereof," might be revoked, and prohibited revocation in any other manner. Our Statute relates to personal property as well as real estate, and has some words transposed, and is slightly different in some other respects; but otherwise sec. 2290, R. S., is substantially the same as that sec. 6. The Statute is imperative upon the court, and is to the effect that "no will, *nor any part thereof*, shall be revoked unless by (1) *burning*, (2) *tearing*, (3) *cancelling*, or (4) *obliterating* the same, *with the intention of revoking it*, by the testator,

. . . or by some other (5) *will* or (6) *codicil* in *writing*, executed as prescribed in this chapter, or (7) by some other *writing*, *signed*, *attested*, and *subscribed* in the *manner provided* in this chapter *for the execution of a will*." Sec. 2290, R. S.

Here are seven ways prescribed for revoking a will, and all other ways, except such as are implied by law, are expressly prohibited. Each of the first four is by doing a specified act to the will itself, with the intention of revoking it. Each of the last three must not only be *in writing* and *signed*, but also *attested* and *subscribed in the presence of the testator by two* or more competent witnesses. Sec. 2282, R. S. It stands confessed that the writing in pencil was never attested or subscribed by any witness, much less by two witnesses in the presence of the testatrix. This failure to execute in the manner prescribed by the Statute manifestly prevented the words written in pencil from going into effect as a written revocation.

It should be observed that the written and printed matter constituting the will was wholly on the first page of the double sheet. The second and third pages were entirely blank. The pencil writing was upon the fourth page, — the outside of the wrapper leaf. Nevertheless, it is urged, in effect, that it was upon the same sheet of paper upon which the will was written, though remote from the writing, and hence that it should be held to have been done to the will itself; and that since the act so done consisted in writing *words* disclosing an *intent to revoke*, it must be held to be a "*cancellation*" of the will, "with the intention of revoking it," within the meaning of those words as used in the Statute. This, however, assumes that the second half-sheet of the paper, upon which no part of the will appears, constitutes a part of the will. If this is so, then a sheet of paper may be never so large, and yet if a will be written upon one corner, and words indicating an intention to revoke be written upon another corner, however distant from every part of the first writing, yet it would have the effect to cancel the will. Would this be a fair construction of the Statute? Would such a construction prevent "frauds and perjuries," according to the original intention of those who enacted the Statute? Or would it be more in harmony with that intention to hold that the written and printed matter together, found on the first page of the double sheet of paper in question, constitutes the will of Mrs. Ladd? Of course, there could be no written or printed matter except upon some substance, and hence so much of the first half-sheet of paper as was essential to the existence and preservation of such written and printed matter, may, in a sense, be regarded as a part of the will. But no part of the double sheet of paper, much less any portion of the first half-sheet upon which the will was written and printed, was in the least burned or torn. Nothing was done to any portion of the written or printed matter constituting the will. No part of it was obliterated. No part of it was erased or cancelled. No interlineation was made. All that constituted the will remained intact. Every part of it remained as perfect

as when it was first written. The same would have been true if the second half-sheet had been entirely severed from the first. The only question is, whether it was cancelled, within the intent of the Statute, by the mere force of the meaning of the word "revoke" contained in the pencil writing. As observed, the Statute requires, not only the act of cancelling the will itself, but that it must be done with the intention of revoking it. *Burtenshaw* v. *Gilbert*, 1 Cowp. 49; *Doe* v. *Harris*, 6 Ad. & El. 209; *Francis* v. *Grover*, 5 Hare, 39; *Price* v. *Powell*, 3 Hurl. & N. 341; *Giles* v. *Warren*, 3 Eng. (Moak), 478; *White* v. *Casten*, 1 Jones Law, 197; *Means* v. *Moore*, Harper (S. C.), 314; *Cheese* v. *Lovejoy*, L. R. 2 Prob. Div. 251; s. c. 21 Eng. (Moak), 633; *Swinton* v. *Bailey*, L. R. 4 App. Cas. 70; s. c. 33 Eng. (Moak), 48; *Evans's Appeal*, 58 Pa. St. 238.

In *White* v. *Casten*, *supra*, the paper upon which the will was written was burned through in three places, one of them being in the midst of the writing, and a large part was scorched, but the writing was not interfered with, when it was rescued against the testator's wish, and preserved against his knowledge, and it was held to be a revocation. The mere act of burning, tearing, cancelling, or obliterating the will itself, without the intent, is not enough. *Burtenshaw* v. *Gilbert*, 1 Cowp. 52; *Francis* v. *Grover*, 5 Hare, 39; *Lock* v. *James*, 13 Law J. Exch. 186; *Elms* v. *Elms*, 4 Jur. (N. S.), 765; *Bigge* v. *Bigge*, 9 Jur. 192; *Clarke* v. *Scripps*, 16 Jur. 783; *Giles* v. *Warren*, 3 Eng. (Moak), 478. So the mere intention to revoke the will, unaccompanied by any act of burning, tearing, cancelling, or obliterating, done to the will itself, is not enough. *Doe* v. *Harris*, 6 Ad. & El. 209; *Hise* v. *Fincher*, 10 Ired. Law, 139; *Mundy* v. *Mundy*, 15 N. J. Eq. 290; *Gains* v. *Gains*, 2 A. K. Marsh. 190; *Runkle* v. *Gates*, 11 Ind. 95; *Perjue* v. *Perjue*, 4 Iowa, 520; *Heirs of Blanchard* v. *Heirs of Blanchard*, 32 Vt. 62; *Clingan* v. *Mitcheltree*, 31 Pa. St. 25.

Some courts have held that where the testator is deceived into the belief that he had done an act sufficient to revoke the will, it shall have that effect. *Pryor* v. *Coggin*, 17 Ga. 444; *Smiley* v. *Gambill*, 2 Head, 164. The case in Head was put on the ground that there was no such Statute in Tennessee, and the case in Georgia fails to refer to any Statute or decision. On the other hand, several of the above cases hold that where the legatee has falsely deceived the testator into the belief that he has in fact revoked his will, he shall be held in equity to hold the property as trustee for the heir; but that there can be no revocation except in one of the modes prescribed by Statute. But see *In re Wilson's Will*, 8 Wis. 171; *Allen* v. *McPherson*, 5 Beav. 469; s. c. 1 Phil. Ch. 133; s. c. 1 H. L. Cas. 191; *Gaines* v. *Chew*, 2 How. 619, 645; *Malin* v. *Malin*, 1 Wend. 625. The question, however, is not here involved, and is referred to merely because counsel seem to rely in part upon the Tennessee and Georgia cases.

Even if such intention to revoke be expressed in writing never so strongly, and signed by the testator, yet, if the writing was never in

fact attested and subscribed by the requisite number of witnesses, in the presence of the testator, so as to become effectual as a revocation under the Statute, it cannot operate as a revocation, when unaccompanied by any of the four acts, done to the will itself, specified in the Statute. *Kirke* v. *Kirke*, 4 Russ. Ch. 441, 451; *Locke* v. *James*, 13 Law J. Exch. 186; s. c. 11 Mees. & W. 901; *Jackson* v. *Holloway*, 7 Johns. 394; *Hairston* v. *Hairston*, 30 Miss. 303; *Lewis* v. *Lewis*, 2 Watts & S. 455; *In re Penniman's Will*, 20 Minn. 245; *Laughton* v. *Atkins*, 1 Pick. 535; *Cheese* v. *Lovejoy*, L. R. 2 Prob. Div. 251; s. c. 21 Eng. (Moak), 633.

In *Kirke* v. *Kirke*, *supra*, the codicil was signed by the testator, who, among other things, in effect therein declared: "I do hereby revoke that part of my said will" which has been erased, and in lieu thereof substitute what has been interlined; but it was held, by an eminent judge in such matters, that, although there was a clear intent to alter the will as indicated, yet that, as the codicil had not been duly executed and attested so as to pass real estate, such intention was ineffectual, and the original will was held to be in force the same as though there had never been any alteration.

In *Locke* v. *James*, *supra*, the testator erased the word "six" wherever it occurred in his will, but leaving it still legible, and inserted over it the word "two," and thereupon added, presumably upon the same paper, the following memorandum or codicil to his will, *signed by him in the presence of one witness only*: "The alterations in the first and second sheet, all relating to the said annuities left to my daughter E. J. and her children, were made by me, the 15th of August, 1830. Witness my hand. R. N.;" — and Parke, B., speaking for the court, said that the "rent-charge of £600 per annum, created by the will, duly executed and attested, . . . has not been cancelled, for the erasure was made *sine animo cancellandi*," and that it "has not been affected by the codicil, for the codicil is not duly attested, and therefore *cannot even be looked at*, so far as the real estate is concerned."

In *Jackson* v. *Holloway*, *supra*, the testator, after having erased certain words and interlined others in place of them, and "at the same time *indorsed on the will* an instrument" to the effect that he had made the alterations named, and thereby renewed the will, which instrument was duly signed, sealed, and published by the testator in the presence of *two* persons, who also signed the same as witnesses in his presence. But because there were not *three* instead of *two* witnesses, as required by the Statute of New York, it was held that the erasures, interlineations, and the written indorsement so executed and witnessed, had no effect whatever upon the original will.

In *Lewis* v. *Lewis*, *supra*, the word "obsolete" was written by the testator upon the margin of his will, but it was held to be of no significance.

In *Laughton* v. *Atkins*, *supra*, it was strongly intimated, if not held,

that the written instrument containing words of revocation must itself be admitted to probate to have that effect.

In *Cheese* v. *Lovejoy*, *supra*, the testator had drawn his pen through the lines of various parts of his will, and then wrote on the back of it, "All these are revoked," and threw it among waste papers; but it was preserved, and it was held that there was no revocation, because the words "or otherwise destroying," in the present English Statute, were not satisfied. But that Statute does not contain the words "cancelling or obliterating," like ours, and ours does not contain the word "destroying," like theirs; and hence the case is distinguishable. But in the more recent case of *Swinton* v. *Bailey*, *supra*, the will was made prior to the Statute of Victoria, and the case was decided under the old Statute like ours, and it was held by the House of Lords that the words "her heirs and assigns forever," through which the testator had drawn his pen, had been obliterated, within the meaning of that word as used in the Statute of Frauds.

Counsel for the respondent insist that the revocation here was complete within the rule followed in *Evans's Appeal*, 58 Pa. St. 238. In that case the will was executed May 24, 1856, and the last clause of it spoke of two erasures and interlineations in their places. At the same time, and immediately beneath the signature of the testator, was a codicil, also signed by the testator, making two changes in the will. Then followed the attesting clause and the signature of the witnesses. On or about July 21, 1858, the testator tore through three different clauses of the will, and made three erasures, one of which was so obliterated as to be illegible; and then made a second codicil, explaining such alterations and revocations. This second codicil was duly signed and published by the testator, in the presence of the requisite witnesses, who subscribed the same. Subsequently the testator tore the first codicil in two places, erased his signature thereto, and also erased his signature to the second codicil, and wrote beneath it the word "cancelled." The will and codicils were all upon the same sheet of paper. This paper was indorsed "Will," which was erased, and the word "cancelled" written beneath it. Independent of the writing of the word "cancelled" there can be no doubt but what the tearing of the first codicil, which was executed at the same time and was in fact a part of the original will, and the erasure by the testator of his signature thereto, and also the erasure by him of his signature to the second codicil, was a complete revocation of the will. *In re Cooke*, 5 Notes Cas. 390; *Price* v. *Powell*, 3 Hurl. & N. 341; *In re Simpson*, 5 Jur. (N. S.), 1366; *In re James*, 7 Jur. (N. S.), 52; *In re Gullon*, 4 Jur. (N. S.), 196; *Avery* v. *Pixley*, 4 Mass. 460; *Mence* v. *Mence*, 18 Ves. Jr. 348. The case of *Woodfill* v. *Patton*, 76 Ind. 375, cited by counsel, was under a different Statute, and hence is not applicable. The same is true of the recent case of *Lovell* v. *Quitman*, 88 N. Y. 377. See *Gay* v. *Gay*, 60 Iowa, 415, which was also under a different Statute.

The learned judge writing the opinion in *Evans's Appeal* was clearly right in saying: "But to enable the will, codicil, or other writing to have such an effect [revocation], it must itself be complete, executed, and proved in the prescribed manner, namely, as a will. The other mode of repeal is something done to the will itself, something more than mere intention expressed. It must be intention to annul carried into execution by acts done to the paper. . . . Were there nothing more than the erasure of the last signature to the writing dated May 24, 1856, it would be difficult to escape from the conviction that it was an act of repeal annulling all that preceded that signature." In view of the additional facts which appeared, that the testator also tore the first codicil in two places and erased his signature from the second codicil, it would be impossible to come to any other conclusion than that he intended, by the acts named, to revoke both of the codicils and the whole will. These several acts being made with the intent to revoke, as there found, clearly amounted to a cancellation of the will; but when the learned judge went further, and construed the word "cancelled," written thereon, and said, "*I think* a repeal [a revocation of the will] is effected by the act of writing upon the will itself a word that manifests an intention to annul it," he was evidently speaking for *himself*, and not for the court, and as it would seem in direct violation of the rule he had just expressed himself, to the effect that there could be no revocation by mere "writing," unless it "be complete, executed, and proved in the prescribed manner, namely, as a will." Besides, such a rule would be in conflict with a previous decision in the same court. *Lewis* v. *Lewis*, *supra*. True, the learned judge attempts to distinguish that case by observing "that though the word was written upon the paper on which the will was written, it was placed where it could have been detached without defacing the instrument. It might have been separated and the will itself remained intact. In this respect it differed from the case now before us." That distinguishing element, even if it were sound, would distinguish *Evans's Appeal* from the case before us, and make *Lewis* v. *Lewis* applicable. The learned judge who wrote that opinion was evidently led to say what he did by what was said by the judge writing the opinion in *Warner* v. *Warner's Estate*, 37 Vt. 356, where the testator wrote on the back of the very paper on which a part of the will was written, and on the second page, and just below some of the writing, so that it could not be separated from it, the words "This will is hereby cancelled and annulled in full, this 15th day of March, in the year 1859." Other words were written on the fourth page, and some erased, but the court held, in effect, that the will was cancelled by force of the above words. If that ruling were sound, the facts would distinguish the case from this; but giving the force of revocation to the words themselves, without being executed, attested, and subscribed as required by the Statute and without any tearing or burning of the paper upon which any part of the will was written, and without erasing, defacing, or obliterating any of the words of the will,

or the signature of the testator or the signature of the witnesses, would seem to leave the case standing alone, with nothing to support it, and in opposition to the principles maintained in some of the best adjudicated cases. Besides, the case is condemned by one of our ablest text writers on the subject. 1 Redf. on Wills (4th ed.), 318. The difficulty with the rule contended for is that it gives to the words written in pencil, although not attested, witnessed, nor executed in the manner prescribed by the Statute, the same force as though they had been so attested, witnessed, and executed, for the purpose of proving that the act of putting the words there was with the "*intention*" of revoking the will. It is the language — the expression by written words alone — which is thus sought to be made effectual; whereas the Statute in effect declares that such written words shall have no force or effect as such unless executed, attested, and subscribed as required.

The argument used by the writer of the opinion in *Evans's Appeal*, *supra*, and here repeated, to the effect that the word "cancelling" in the Statute is used in the same sense as cancelling notes, bonds, or other written instruments, is plausible, but fallacious. It is the payment, adjustment, settlement, or decree of the court which precedes the writing of the word "cancel" upon the instrument, that effects the cancellation. The word is written in such case merely as a memorandum or evidence of the previous facts which operate as a nullification. Besides, such writing is generally upon the face of the instrument itself, and not upon some remote corner of the same sheet. A will, unlike other written instruments, does not go into effect until the testator's death. The mode of making a will is definitely prescribed by Statute, and the mode of revoking wills is also definitely prescribed; and no essential part of the latter can be dispensed with any more than the former. So, a specific mode of cancellation of tax certificates, &c., fixed by Statute, furnishes no ground for holding that a will, though not included in such Statutes, may also be cancelled in the same way. Our Statute as to the mode of revoking wills came to us with its history, and the constructions which had been put upon it by the courts. In so taking it, the people of the State knew what they had obtained. To change that construction by some artificial mode of reasoning is to open the door to vagueness and uncertainty, the disastrous effects of which no one can in advance determine.

But it is claimed that such intention to revoke is sufficiently proved, without resorting to the words in pencil, by the declarations of the testatrix. It is not claimed, and there is no evidence tending to show, that any of such declarations were made at the time the words in pencil were written, but on other and different occasions. Such declarations are clearly inadmissible, because they do not constitute a part of the *res gestæ;* besides, to allow them to have the force of evidence would be admitting testimony of one unsworn, and without the privilege of cross-examination. *Jackson* v. *Kniffen*, 2 Johns. 31; *Waterman* v. *Whitney*, 11 N. Y. 157; *Staines* v. *Stewart*, 8 Jur. (N. S.), 440;

Boylan v. *Meeker*, 28 N. J. Law, 274; *Hargroves* v. *Redd*, 43 Ga. 142; *Runkle* v. *Gates*, 11 Ind. 95. The admission of such declarations to rebut the inference of fact arising from the absence or loss of a will is upon a different theory, as will appear from the well-written and able opinion of Judge Dyer in *Southworth* v. *Adams*, 11 Biss. 256. It has been held that where the intention to revoke had existed and been partly carried into execution, and the testator changed his mind and arrested the act of burning, tearing, cancelling, or obliterating the will before its completion, leaving the will so that its contents could still be read, that it might nevertheless be admitted to probate. *Doe* v. *Perkes*, 3 Barn. & Ald. 489; *Doe* v. *Harris*, 6 Ad. & El. 209; *Giles* v. *Warren*, 3 Eng. (Moak), 478.

So, where there has been an attempt to alter certain portions of the will by erasure, without obliteration, and by substituting new words in their place by way of interlineation, and the writing thus altered failed to go into effect for want of re-attestation, courts have held that there was no intent to revoke, except by way of alteration, which having failed, the will remained intact as before. *Short* v. *Smith*, 4 East, 418; *Kirke* v. *Kirke*, 4 Russ. Ch. 435; *Martins* v. *Gardiner*, 8 Sim. 73; *Locke* v. *James*, 13 L. J. Exch. 186; *Jackson* v. *Holloway*, 7 Johns. 394; *McPherson* v. *Clark*, 3 Bradf. Surr. 92; *Wolf* v. *Bollinger*, 62 Ill. 368; *Wright* v. *Wright*, 5 Ind. 389; *In re Penniman's Will*, 20 Minn. 245; *Quinn* v. *Quinn*, 1 Thomp. & C. 437; *Wheeler* v. *Bent*, 7 Pick. 61.

But without further discussion, which is already too extended, the judgment of the Circuit Court is reversed, and the cause is remanded with direction to reverse the judgment of the County Court and to direct judgment admitting the will to probate.

By the Court. *Ordered accordingly.*

Note. — On the presumption that a will not found has been destroyed by the testator, and on the presumption of intention to revoke when one of two duplicate wills has been destroyed or cancelled and the other not; also on the question whether a cancellation is to be presumed as final or only deliberative, *e. g.*, when made with pencil, — see 1 Jarm. Wills (4th ed.), 132, 133, 137, 138.

On the meaning of a Statute authorizing revocation by "mutilation," see *Woodfill* v. *Patton*, 76 Ind. 575 (1881).

A will in favor of A. has been *held* by the New York Court of Appeals, to be avoided by A.'s murdering the testator, *Preston* v. *Palmer*.

C. *Dependent relative Revocation.*

ONIONS *v.* TYRER.

CHANCERY. 1717.

[*Reported* 2 *Vern.* 742.]

MR. TYRER, in 1707, made a will, duly attested by *three* subscribing witnesses, and thereby had disposed of his real estate, and being afterwards minded to make some alteration in his will, in the year 1711 he made a second will touching his real estate, and with a clause in it of revoking all former wills; but there being no table in the room where the testator lay sick and subscribed his will, the *three* subscribing witnesses did not attest it in his presence, but went into a lower room out of the testator's sight, and there wrote their names as witnesses to the publishing this latter will; and it was also in proof in the cause that there being two parts of his former will, one whereof was in his custody, he called for that which was in his own custody, and directed his wife to cancel it, and the witness swore she heard her tear it; and the question now was, whether the former will was well revoked, or not.

First. It was resolved, that although there was an express clause in the latter will of revoking all former wills; yet *that* latter will being void, the witnesses not attesting the same in the testator's presence, *that* would not amount to a revocation, it being intended to operate as a will, and not otherwise as an instrument of revocation: and so it was adjudged in the case of *Eggleston and Speak*, 3 Mod. 258; Sir Bart. Shore's Reports, 89; and in the case of *Hilton and King*, 3 Lev. 86.

Secondly, where there were duplicates, and two parts of the former will, in case the testator duly cancelled and tore *that* part, which was in his own custody or keeping, that would be an effectual cancelling of the will, although the other part or duplicate remained whole and uncancelled; and it was so resolved in *Sir Edward Seymour's Case.*

Thirdly. LORD CHANCELLOR [LORD COWPER] was of opinion, that the former will stood good; for the latter will being void, and not operating as a will, would not amount to a revocation; and as to the actual cancelling of the former will, the evidence was not full and positive, that it was done; the witness thought she heard the wife tear it. It is plain he did it only upon a supposition that he had made a latter will at the same time, and both wills as to the main, were much to the same effect, and with little variation as to the disposition of the real estate; and he did not cancel it with a design to revoke the devises as to the real estate, but intended to do the same thing by a latter will; and in case it had been a good cancelling of the will at law, it ought to be relieved against, and the will set up again in equity, under the head of accident, and decreed it accordingly.

ATTORNEY-GENERAL *v.* LLOYD.

CHANCERY. 1747.

[*Reported* 1 *Ves. Sr.* 32.]

JOHN MILLINGTON, seised of a considerable real and personal estate, made a will in 1734, and gave his real and personal estate to be laid out in purchase of real estate, to his executors and other trustees and their heirs, to apply the rents and profits to payment of some legacies; then to reimburse themselves, and then to a charity. He afterwards made a codicil in 1736, taking notice that he had given his real and personal estate to certain uses; and that being doubtful, whether by the late Mortmain Act his devise of his real estate to the charity or part thereof would be good, and being desirous to confirm it in that case, and not otherwise, he gives so much of his real and personal estate, as could not pass by his will, to the use of his nephew, Millington Buckley, at his age of twenty-one, with limitations over, on his dying without issue, with proper maintenance till that age. He afterward makes *another codicil, reciting the former and the will, and that being advised, that his devise to the charity was void as to the real estate, though not as to the personal, and being desirous to continue it, and to make farther provision for better support thereof*, he gave his personal estate to his executors upon trust, that if it cannot be laid out in land, it may in securities for the same charity; and his real estate he gives unto and for the use of Millington Buckley, at twenty-one; and declares, that it is his opinion, that his estate at L. is sufficient to maintain him during his minority. Upon an information to have the will and codicils so established, as that the charity might be carried into execution; it was decreed at the Rolls that the will was well proved, and that the trusts should be performed, and that a scheme should be proposed for carrying the charity into execution: from which decree the defendant, Millington Buckley, brought the present appeal.

LORD CHANCELLOR. [LORD HARDWICKE.] I am very doubtful about this case, and would put it in a proper way of being determined. This is very different from all the cases cited. The question of revocation does not turn upon collateral circumstances, but merely on the words in the instruments themselves; which make it differ from *Onions* v. *Tyrer*; indeed, Lord Cowper there says, it might be relieved on the head of accident; but I do not know how he could come at it in a question between devisee and heir-at-law. It is proper, therefore, for a court of law; and the same construction must be made as there. The first reason why I doubt, is, that if the testator had intended, as the relators contend, that this was a revocation, and a new devise only in case the will was not good, he would have left it on the first codicil: and no occasion for making a new one; for it would be just the same with

respect to the charity as on the first. Another reason, which makes me doubt, is, that it is very nice to say, that because the reason a person gives fails, therefore his devise should fail. I do not know how far that will extend; the testator has put it on the advice he received, which was a fact of his own knowledge; and he has grounded it on that advice, and not on the reality of the law: he might do it in order to quiet the doubtful question; but I do not say he did so. The third and principal reason is, I doubt, whether this disposition is put singly on the point of law: for considering the material words *being advised*, and the subsequent words, who can tell what he meant there? The codicil was made two years after, and his personal estate might be so increased as to be a sufficient fund for the charity; for all this together might be his reason, and it is impossible to say he depended on one more than another. I give no opinion, for it is a mere point of law, and a new case; and will send it in to B. R., to be there solemnly argued, and reserve further considerations till after the judge's certificate.[1]

CAMPBELL *v.* FRENCH.

CHANCERY. 1797.

[*Reported* 3 *Ves. Jr.* 321.]

THE will of the testator, dated London, 23d of August, 1790, and disposing of personal estate only, contained the following clause:

"As I understand, that my late sister Margaret Bell has two grandchildren living in Northumberland County, Virginia, within three miles of North Cherry Point Church, whose names are Price Campbell, a grandson, and Pinkston Campbell, a granddaughter, I give to each of them £500."

A codicil, dated the 5th of January, 1791, contained the following clause:

"And as to the legacies or bequests given or bequeathed by my will to my sister, Margaret Bell's grandchildren, I hereby revoke such legacies and bequests; they being all dead."

The fact of the death of the legatees was not true. Pinkston Campbell married William Atkins in America. The bill was filed for an account and payment of these legacies.

Evidence proving the identity of the plaintiffs was read.[2]

Mr. Lloyd and *Mr. Harvey*, for the trustees, defendants.

[1] The question was, "Whether the testator's real estate in S. and S. were well devised by the second codicil, dated the 17th of March, 1736, to the defendant M. B. for life, with remainder over to his first and other sons in tail-male, the said M. B. having attained his age of 21 years," &c. The court certified in the affirmative, whereupon Lord Hardwicke declared and decreed accordingly.

[2] Only that part of the case which relates to the question of revocation is given.

Lord Chancellor. [Lord Loughborough.] It appears to me there is no revocation, the cause being false; whether by misinformation or mistake is perfectly indifferent. . . . Declare the legacies not revoked, the parties being alive.[1]

WINSOR *v.* PRATT.

Common Pleas. 1821.

[*Reported* 2 *Brod. & B.* 650.]

Detinue to recover the title deeds of real estates, of which Charles Reeks died seised; plea general issue. The cause was tried before *Dallas*, C. J., at the sittings at Westminster, after last Easter Term, when a verdict was found for the plaintiffs, subject to the opinion of the court, upon a case, of which the following is the substance. Charles Reeks, on the 17th July, 1812, made a will, by which he devised the rents and profits of the greater part of his real estates to his wife, for her life, and on her decease, to Mary Burford, the mother of his wife, for her life, and on the decease of his wife and her mother, he devised the same to his executors in fee. Upon trust to sell and divide the produce equally between his three sisters, Jane Boucher, Susannah Winsor, and Thomazine James, or to the issue of such of them as should happen to depart this life before the same should be receivable. He also devised other real estates to his wife in fee, and certain leasehold property and personalty, to her absolutely. After bequeathing some legacies, he directed his residuary estate to be sold, and the produce to be divided equally between his wife and his three sisters. The will, which was attested by three witnesses, concluded by stating, that he had signed his name to the two first sides, and his hand and seal to the last side of the will, which was written on three sides of one sheet of paper. The testator did put his name and seal at the end of the will, but did not sign his name to the two first sides. In November, 1816, he made various interlineations and obliterations, the effect of which, as regarded his real estate, was to confine the first devise to his wife to her widowhood, and to strike out the devise to her mother. The original date was struck out, and day of November, 1816, was substituted. The will was never re-signed, republished, or reattested, but in the following month, the testator caused a fair copy of it to be made, and added one interlineation not affecting his real estate. But the copy was never signed, published, or attested, and on the 24th December, 1816, the testator died without issue. The plaintiffs, Jane Boucher, Susannah Winsor, the wife of William Winsor, and Thomazine James, were coheiresses of the testator, and as such, claimed to be entitled to the real estates of which Charles Reeks died seised, subject to the dower of his

[1] See, *accord.*, *Doe* d. *Evans* v. *Evans*, 10 A. & E. 228 (1839).

widow. The widow claimed to be entitled to the whole of the estates under the devise. The will and fair copy were found locked up in a drawer at the testator's residence, the day after his death. The defendants, whom he had appointed executors in January, 1817, obtained probate of the will of the 17th July, 1812, with the interlineations and obliterations; and having obtained possession of all the title deeds of the real estates, refused to deliver them up to the plaintiffs.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover, and to what extent, or in respect of which of the real estates of the testator mentioned in the said will. If the court should be of opinion, that the plaintiffs were entitled, the verdict to stand with nominal damages; the defendants undertaking, by rule of court, to deliver up all the title deeds to the plaintiffs to which they might be entitled. But if the court should be of opinion, that the plaintiffs were not entitled to recover, then a nonsuit was to be entered.

Pell, Serjt., for the plaintiffs.

Lawes, Serjt., for the defendants.

DALLAS, C. J. The facts of this case are so completely in the possession of the court, that it becomes unnecessary for me to recapitulate them. And two questions arise: first, whether the will of 1812 was duly executed; and, secondly, whether that will, supposing it to have been duly executed, has been cancelled or revoked. And, upon the first point, it has been contended, though without laying any great stress upon the objection, that the will of 1812 was not valid for want of sufficient execution; inasmuch as the will, being on three sides of a sheet of paper, the testator states, at the end of the third side, that he has signed his name to the two first sides thereof, and his hand and seal to that side; whereas, in point of fact, he has not signed the two former sides, but only the last. And, to maintain this objection, the case of *Right* v. *Price* [1 Doug. 241], has been relied on, and particularly the following part of Lord Mansfield's judgment in that case: "There are many particular circumstances in this case besides the general question. The testator, when he signed the two first sheets, had an intention of signing the others, but was not able. He, therefore, did not mean the signature of the two first as the signature of the whole will. There never was a signature of the whole." Now, I own, as I understand this case and the principle on which it was decided, that it appears to me to turn directly the other way; for it shows an intention on the part of the testator, and an incapacity to carry that intention into execution. In that case, the will was on five sheets of paper, and the testator had signed two of them, and showed an intention to sign the others, but was unable to do so; but, in this case, the will is written all on one sheet of paper, and the testator has signed it at the end. There, the intention of the testator was defeated by incapacity; here, the act of the testator points to nothing prospective; and, whatever might have been his intention at one time of signing the former sides, he has by his final signature abandoned that intention. In the first objection, therefore,

there is no validity; and the case then resolves itself into the main question — whether the will of 1812, being a valid will, has been revoked? That question turns upon the facts of the particular case; and from them it appears that the testator never intended to die intestate. That he had no such intention in 1816, is evident from the fair copy of the altered will found among his papers after his death. The question, then, will be, whether, if he intended his altered will to stand in the place of the former, he has carried his intentions into execution; and it has been contended, that the obliterations amount to a distinct act of revocation of his former will. Now, the revocation of wills may be effected in many different ways; but the principle to be found in the books applicable to all of them is, that a mere intention, not carried into effect, does not operate as a revocation. The act done by the testator may be merely demonstrative of his intention; and I take the distinction to be, that where there is evidence of an intention to revoke, if that intention has not been carried into effect, the former will remains precisely as it was. In the case before the court, all the evidence of an intention to revoke appears on the face of the will itself; but if the testator had intended to effectuate such revocation, it is not too much to suppose that he would have conducted himself differently. He might have torn the will, — he might have burned or cancelled it; none of which acts he appears to have done. It seems to me that the testator did not intend to revoke the devises altogether, or to die intestate; but to make another will, merely altering some of the devises. And I take the rule to be, that where a testator designs to revoke a former will by an instrument making new dispositions of his property, he discovers only a conditional intention to revoke; or, in other words, his intention to revoke is so coupled in appearance with his new testamentary act, that, unless he completes such testamentary act by observing the formalities requisite to its perfection, he is not looked upon in law as manifesting a deliberate purpose of revoking. And, again: The effect of cancelling depends upon the validity of the second will, and ought to be taken as one act done at the same time; so that if the second will is not valid, the cancelling of the first being dependent thereon, ought to be looked upon as null and inoperative. My opinion goes on the broad ground, that, in my view of the facts belonging to this case, the testator only intended to carry his alterations into execution by a future will, which intention he never carried into effect. I, therefore, think that the original will is not void, and consequently that the plaintiffs are not entitled to recover.

Park, J. I am of the same opinion on both points; nor do I think that the case of *Right* v. *Price* assists the first. That the testator has not signed the two first sides of the will is, I think, immaterial. The court, indeed, seemed to me to dispose of this point in an early stage of the argument. The second, involving the great question in the case, has been so fully entered into by my Lord, that it will be unnecessary for me to go much at length into it. The difficulty presented to us

arises from the erasures and interlineations, which, it is said, amount virtually to a revocation of this will. The Statute of Frauds has pointed out the mode of avoidance of wills, namely, by actual revocation; and says, that "all devises and bequests of lands and tenements shall remain and continue in force until the same be burned, cancelled, torn or obliterated by the testator, or by his directions; or unless the same be altered by some other will or codicil in writing, or other writing." The alterations in this will do not, in my opinion, answer the description given in the Statute. The other modes enumerated by the Statute are, burning, cancelling, or tearing. Can it be predicated of this will that it was either burned, cancelled, or torn? Even if it could, we must look to see whether the act done were done *animo revocandi*, a question, generally, for the jury, but, in the present case, for the judges to determine. Now, the rule I take to be that which has been drawn by his Lordship from the case of *Onions* v. *Tyrer*. If the testator's intention were only to make obliterations on that paper with a further view, such bare intention will not, in point of law, amount to a revocation, though it were apparent from the case that the testator intended to execute the fair copy. And, in this view, I think the case of *Doe* v. *Perkes* does bear on the point before us; for nothing can be stronger than the feeling manifested by the testator in that case against the devisee when he began the work of destruction, though he afterwards became calm, expressed himself satisfied that it was no worse, and fitted together the pieces into which he had torn the will. The learned judge who tried that cause left it to the jury to say whether the testator had done all he intended, or whether he was not prevented from completing the act of destruction which he intended; and the court held, that this was properly left to the jury, and refused to disturb the verdict, which was given in favor of the devisee. I recollect also a case which was tried before me in Northumberland, in which there was a similar result. I am clearly of opinion that the obliterations and alterations of this will, coupled with the circumstances of this case, do not amount to a revocation; and, consequently, that the judgment ought to be for the defendant.

Burrough, J. It appears to me that the Statute of Frauds is decisive of this case. It is by no means clear to me that the obliterations and interlineations alter the estate of the trustees, as to the freehold devise; but, supposing them to have this effect, I do not think that the case would be altered. I am satisfied that these are not obliterations or interlineations within the Statute. Here is an inception of an act done by the testator, but no completion. The act of having a fair copy made, shows that something was meant to be done; but this testator, who was an attorney, must have known that the execution of this paper must have taken place in the presence of three witnesses, to make it valid as a will affecting his real estate.

I think there is no foundation for the objection raised on the non-signature of the original will by the testator, on the two first sides. The last sentence in the will expresses that he has signed the three

sides: of this he is perfectly cognizant, and signs the last of the three sides, thereby expressly adopting all the three. I am, therefore, of opinion that the plaintiff has no right to recover the title-deeds, and that the present action will not lie.

Richardson, J. I entirely agree with the rest of the court, upon both points. Upon the first, I shall merely say that I consider the will to be well executed; because the testator did all that he intended to do at the time of execution. It is quite clear that the testator did not intend to revoke, but only to alter his will; but, supposing that his intention was to revoke, he has not done so according to the direction of the Statute of Frauds. According to the case of *Sutton* v. *Sutton* [Cowp. 812], and the other cases, the obliterations and alterations made by this testator would not amount to a revocation of his will. But I think it better to take this case on the broad ground; for all the facts show that revocation was not the testator's object. He had a fair copy made of the original will, as altered; and, therefore, never intended to die intestate. The act of substitution was inchoate and incomplete, and totally inoperative till carried into execution.

Judgment for the defendants.

GOODS OF APPLEBEE.

Prerogative Court of Canterbury. 1828.

[*Reported* 1 *Hagg. Ecc.* 143.]

William Applebee died on the 7th of November, 1827, leaving behind him Mary Ann Arnald, widow, his natural and lawful sister, and only next of kin; and Sarah (wife of Charles Bassage), his lawful niece — the only persons entitled in distribution in case he had died intestate. The deceased duly executed his will on the 14th of April, 1823. In 1825, he delivered this will (the exhibit A) to Mr. Jackson, the sole executor, and requested him to make certain alterations in it. Mr. Jackson drew his pencil through the signature at the bottom of the will, and made some alterations with the same material: the deceased expressed his approbation of them, and said, that he would make a copy, and execute the same in the presence of witnesses.

On the 29th of September, 1827, the deceased mentioned to his solicitor, that he had made his will in his own handwriting, and promised to show it to him; and on the first of November, he told an intimate friend — whose opinion he had asked respecting the papers marked B — that he would write his will again; and, on the evening of the same day, the deceased mentioned to his sister that he proposed to recopy his will. On the 6th, the deceased brought the papers (B) from his bedroom into the parlor, and said to his sister, "That he had intended to reduce them to a smaller compass, but found himself too weak to do so; and added,

that if he did not get better, he would have his will written for him on the morrow." On the following day, the deceased died: "B" was found in a closet of his bedroom; and "A" was found (with the signature of the deceased, and the names of the witnesses struck through), in a box with leases, and documents of importance.

These circumstances were fully substantiated by affidavit, and Mrs. Arnald and Mrs. Bassage and her husband had executed a proxy, consenting "to probate of the said will of the deceased, bearing date the 14th of April, 1823, or letters of administration with the said will, or the said testamentary memoranda annexed, of all and singular the goods, chattels, and credits of the deceased, being granted in such manner and form, and to such person, as the court may direct."

Lushington moved for a decree.

Per Curiam. The paper B is, in substance, the same as the will of 1823, marked with the letter A; but it also contains a great deal of matter extraneous, and not of testamentary import. There can be no advantage in annexing it to the will. The signature of "A," being struck through, is to be regarded as preparatory to the deceased making a new will — which he did not do; this must be considered, then, as only a conditional cancellation, and, consequently, not a revocation. The court, therefore, as the consent of all parties interested has been given, thinks it would best consult the intentions of the deceased, by decreeing probate of "A" singly, as it originally stood before the signature was touched.

Motion granted.

GOODS OF MORESBY.

Prerogative Court of Canterbury. 1828.

[*Reported* 1 *Hagg. Ecc.* 378.]

This was an application from the widow of Lieutenant Moresby, R. N., that probate of his will, dated on the 25th of January, 1821, might be granted to her as sole executrix; and in support of her application she made the following affidavit: —

"That she was the relict of the deceased, sole executrix, and universal legatee for life named in his will, duly executed and dated the 26th of January, 1821; that shortly after this period the deceased left England, in the command of a private merchant vessel, taking with him this will, and proceeded with his wife to Peru; that after their arrival, they resided principally on board; but that during a temporary absence of Lieutenant Moresby, the vessel with all his effects and papers, including his will, was captured by pirates, but was soon afterwards retaken; that on the occasion of such capture, the deceased lost several papers of consequence, and expressed his firm belief to his wife that his will had then been destroyed. That the deceased, as she has

been informed, and verily believes, whilst at the city of Bolivar, was attacked with the illness of which he died; that on the 13th day of February, 1827, the day before his death, being incapable of writing, and fearing he might die intestate, he sent for a notary, in whose presence, and that of four other witnesses, he made a nuncupative will by declaring, that in contemplation of his death, he nominated and appointed two executors — both resident in the city of Bolivar — and his wife sole heiress, and revoked all his other testamentary dispositions; but that the said will was not reduced into writing in the lifetime of the deceased." Mrs. Moresby further made oath, "that, upon the renunciation of the two executors in the proper court at Lima, she there duly proved the nuncupative will, and administered the effects in Peru; and that shortly before the deceased's death, and, as she verily believes, while he was at Bolivar in his last illness, she discovered among his papers on board, the will, dated 26th January, 1821, but that he died in ignorance of that circumstance." The affidavit further stated, that both the executors were resident in the city of Bolivar, or some other part of Peru, of which one was a native.

The only property of the deceased in this country consisted of about £500 due for arrears of half pay.

Lushington. The question is, whether a nuncupative will made and proved in Peru supersedes a prior will written and executed in this country — whether the Statute of Frauds (29 Car. II. *c.* 3, § 22) does or does not affect such a case. The widow, in asking probate of the will of 1821, waives an interest which she would take under the will of 1827 — in the former, she has but a life interest — in the latter, she is absolute universal legatee.

Per Curiam. It is not necessary here to decide the question (upon which there may be some doubt), whether the Statute of Frauds would apply to the nuncupative will made in Peru. Both wills contain nearly the same disposition, and give the whole property to the wife; the latter absolutely: the former, of which she is content to take probate, for life only. It appears that the deceased did not intend to revoke the will of 1821, but supposing it to be lost, and being unwilling to die intestate, he made the nuncupative will. As, however, the former has been recovered, there is no objection to probate thereof being granted to the widow and universal legatee for life.

Motion granted.

LOCKE *v.* JAMES.

EXCHEQUER. 1843.

[*Reported* 11 *M. & W.* 901.]

PARKE, B.[1] The material facts in this case were as follows.

Ralph Nicholson, by his will, duly signed and published in the presence of and attested by three witnesses, devised certain real estates in Essex to his son Ralph Nicholson in fee, charged with the payment of an annuity of six hundred pounds to his daughter Elizabeth James, the defendant, for her life, with the usual powers of distress and entry; and after various other devises and bequests, he gave all the residue of his estate, after payment of his debts, and the legacies and annuities thereinbefore bequeathed, and the duty payable thereon, to his said son, his heirs, executors, and administrators. On the 15th of August, 1830, the testator with his pen erased the word "six," in the gift of the annuity, and wrote over it the word "two," leaving, however, the word "six" still legible; and on the same day, he signed a codicil in the presence of and attested by one witness only, mentioning that he had on that day made the above-mentioned alteration.

The testator died in December, 1831, and his will and codicil, with other codicils not material to be now considered, were duly proved soon after his decease, and the executors possessed themselves of his personal estate, which was more than sufficient to satisfy his debts and legacies, including the annuities.

The plaintiffs are the parties entitled to the real estate under Ralph Nicholson, the devisee, and they have brought the present action, which is an action of trespass for seizing their goods under a distress. The question is, whether the defendant is entitled under the will and codicil to an annuity of £600 *per annum*, or to an annuity of £200 *per annum* only. If she is entitled to £600 *per annum*, then it is admitted that the distress was lawful, and that this action cannot be maintained.

It was not, and indeed could not have been, disputed, but that if the annuity had been charged on the real estate only, then neither the erasure nor the codicil would have affected it. The erasure would have had no effect, because the testator did not mean to destroy the annuity of £600 *per annum* in any other way than by substituting for it an annuity of £200 *per annum*. The substitution in the will was inoperative, having been made after the subscription of the witnesses, not in their presence, and without republication; and the substitution, for the purpose of giving effect to which the erasure was made, thus failing, the law is clear that the erasure fails also. It is treated as an

[1] Only the opinion is given.

act done by mere mistake, *sine animo cancellandi*. What the testator in such a case is considered to have intended, is a complex act, to undo a previous gift, for the purpose of making another gift in its place. If the latter branch of his intention cannot be effected, the doctrine is, that there is no sufficient reason to be satisfied that he meant to vary the former gift at all. The codicil or memorandum, being unattested, clearly could have no effect on the disposition of the real estate.

But on the part of the plaintiffs, it is argued, that, taking such to be the law where the gift relates to real estate only, yet here the case is different, for that, looking to the whole will, the personal estate would be the primary fund for payment of the annuity, the real estate being liable only in case the personal estate should be deficient. And then it was said, the erasure and codicil together would certainly have the effect of reducing the annuity, so far as it was payable out of the personal estate, and so, by necessary consequence, must affect the real estate, which is merely charged by way of security, in case the personal estate should be insufficient. And in support of this proposition the plaintiffs relied mainly on the case of *Brudenell* v. *Boughton* [2 Atk. 268], before Lord Hardwicke. The defendant's counsel, on the other hand, contended that, even supposing *Brudenell* v. *Boughton* to have been well decided, yet it did not apply to a case like the present, but only to the case of a general charge of legacies; and he referred to *The Attorney-General* v. *Ward* [3 Ves. Jr. 327], *Kirke* v. *Kirke* [4 Russ. 435], *Beckett* v. *Harden* [4 M. & S. 1], and other cases.

We do not think that, in order to decide this case, we are bound to discuss, or indeed that we should be warranted in discussing, the question as to what effect a court of equity might give to the acts of this testator. The question for our decision is a mere legal question. The testator by his will gave to the defendant a legal interest in his lands (for an annuity charged on land, with a power of distress, is clearly a legal interest), and what we have to decide is, whether that legal interest has since been altered. We are clearly of opinion that it has not. It is clear, that if the annuitant had nothing but the land to resort to, her interest would have remained unaltered, for the reasons already mentioned, and the circumstance that she may, through the medium of a court of equity, have another fund liable to her demand, cannot possibly affect our judgment. A court of law cannot look to anything but the legal rights of the parties; if, by means of the erasure and codicil, that which was originally a right to or a security for £600 *per annum*, has now become a security for £200 *per annum* only, the parties injured by the attempt to enforce the larger demand must have recourse to a court of equity for relief. The legal interest remains as it was originally.

That legal interest is a rent-charge of £600 *per annum*, created by a will duly executed and attested. The gift of this legal interest has not been cancelled, for the erasure was made *sine animo cancellandi*. It

has not been affected by the codicil, for the codicil is not duly attested, and therefore cannot even be looked at, so far as the real estate is concerned. On this short ground there must be

Judgment for the defendant.[1]

Martin, for the plaintiffs.
Coote, contra.

TUPPER *v.* TUPPER.

CHANCERY. 1855.

[*Reported* 1 *K. & J.* 665.]

WILLIAM GEORGE TUPPER made his will in 1851. After a profession of religious faith, it contained the following provision: "In acknowledgment to Almighty God that all I have is His already, and that I am but His steward, I hereby offer to Him the sum of £850, being about one tenth of my property; which sum of £850 I desire may be raised by my executors hereinafter named out of my pure personal estate, and such as I am by law entitled to dispose of and appropriate, and paid by them in manner following (that is to say): To the treasurer for the time being of the Missionary College of Saint Augustine, at Canterbury, the sum of £300; to the treasurer for the time being of the Society for Promoting the Employment of Additional Curates in Populous Places, the sum of £300; and to the treasurer for the time being of the Tithe Redemption Trust, the sum of £250." And after giving some pecuniary legacies, the testator gave all the residue of his property, and appointed executors.

By a codicil, dated in 1853, he made the following gift: "Whereas I have in and by my said will desired my executors therein named to pay the following legacies, namely: To the treasurer for the time being of the Missionary College of Saint Augustine, at Canterbury, the sum of £300; to the treasurer for the time being of the Society for Promoting the Employment of Additional Curates in Populous Places the sum of £300; and to the treasurer for the time being of the Tithe Redemption Trust, the sum of £250; now I do hereby revoke the beforementioned legacies, and in lieu thereof I give and bequeath to the treasurer for the time being of the House of Charity in Rose Street, Soho, aforesaid, the sum of £1,000, for the extension fund of the said House of Charity; which I direct may be raised by the executors in my said will named out of my pure personal estate, and such as I am by law entitled to dispose of and appropriate."

The extension fund of the said House of Charity was a fund which was being raised for the purpose of providing a freehold site and a suit-

[1] See, *accord.*, *Kirke* v. *Kirke*, 4 Russ. 435 (1828); *Brooke* v. *Kent*, 3 Moo. P. C. 334 (1840); *Soar* v. *Dolman*, 3 Curt. 121 (1842); *Goods of Nelson*, Ir. R. 6 Eq. 569 (1872).

able building for the purposes of the said institution, instead of the house now occupied.[1]

Mr. Charles Hall, for the executors and two of the residuary legatees.

Mr. C. G. Smith, for other residuary legatees.

Mr. Haddan, for the treasurer of the House of Charity.

Mr. Daniel, Q. C., and *Mr. Batten*, for the treasurer of the Tithe Redemption Trust.

Mr. Cotton, for the Treasurer of the Charity for Promoting the Employment of Additional Curates.

Vice-Chancellor Sir W. Page Wood. There is some difficulty in this case, because, although the difference may not be very striking, it is not precisely the case of a gift to an object incompetent to take; but I think that it falls within the principle of the case in which there was a devise to a parish; and that to make a distinction between them would be carrying the refinements, which have gone very far already, farther than would be advisable. I concede that it is very difficult to make a satisfactory distinction between *Onions* v. *Tyrer*, 1 P. Wms. 343, and those cases in which the gift fails for want of capacity in the devisee to take. There is this difference, that, in cases like *Onions* v. *Tyrer*, the testator is making an instrument, which he intends to be effective as a whole, and the law takes away one half, in the same manner as though it cut off the operative half of the instrument, leaving only the revoking part of the will; and it may be said, that it was the intention of the testator that the instrument should operate in an entire and not in a mutilated form; while in the other cases, where the testator has made certain gifts, which are invalid in law, the instrument is in a sense operative, but the party to take under it is not allowed to receive the benefit.

It has been argued, that the law does not render the treasurer of a charity absolutely incapable of taking, but only makes void the gift to him in trust for the purposes of this charity; and therefore, that this part of the will is blotted out; and that makes the case still more like *Onions* v. *Tyrer*. I think, however, that though something is to be said for it, that is too fine a distinction to make any real difference between this case and that in which there was a gift to a parish. Although the law would prevent that from taking effect either by deed or will, yet being by will, in which the testator manifested an intention to revoke a previous gift, it was held that the revocation must take effect, although the gift was void. *French's Case*, Roll. Abr. "Devise," O. 4.

In this case the gift is to a charity, and regarding the solemn introduction to his will, it is probable that the testator did not intend to withdraw from pious uses the sum which he had set apart for them; but that does not indicate an intention that the legatees whose legacies he revokes should remain recipients of his bounty. He expressly says by the codicil, that they shall not receive anything, but that the fund

[1] The statement of the case is abbreviated from that in the report.

shall be given to another object; and though this latter cannot take it, I cannot speculate on whom he might wish to confer the benefit in such an event. He desired to devote the money to charity generally. The law prevents the particular object which he has designated from taking anything, and I must hold that the revocation remains in force, though the gift by the codicil may be void.[1]

GOODS OF PARR.

COURT OF PROBATE. 1859.

[*Reported* 6 *Jur. N. S.* 56.]

THOMAS PARR, late of Runcorn, in the county of Chester, made and duly executed his will, bearing date the 2d October, 1857, and thereof appointed William Francis Salkeld, of Runcorn, James Stockdale, of the same place, tailor, and William Brundrit, of the same place, gentleman, executors. In June, 1858, the testator requested William Howard to erase the names of James Stockdale and William Brundrit from the will, and to substitute in their stead the names of William Howard and Thomas Duckworth, as executors. William Howard, at the time the testator gave him these instructions, in order to guide himself in substituting the names, wrote, as a memorandum, in the margin of the will, opposite the appointment of executors, the names "Wm. Howard" and "T. Duckworth." He subsequently completely erased (so as no longer to be legible) the names "James Stockdale" and "William Brundrit," and superscribed the name of William Howard in the place of James Stockdale, and Thomas Duckworth in the place of William Brundrit. The testator then signed his name in the margin in the presence of William Howard, and opposite to the erasures. The testator died on the 18th June, 1859.

Spinks applied to the court to decree probate of the will of the deceased to William Francis Salkeld, one of the executors therein named, power being reserved to James Stockdale and William Brundrit, the other executors. He submitted, on the authority of *Brookes* v. *Kent*, 3 Moo. P. C. 334, and *Soar* v. *Dolman*, 3 Curt. 121; 6 Jur. 512, that as the names of the two executors were erased with the sole intention of substituting other names, and that alteration was invalid, the original names must be restored, and evidence be received to satisfy the court whose they were.

SIR C. CRESSWELL, J. O. In this case I have given directions to the registrar that in the probate the names of the executors, as they originally appeared, shall be restored. I have looked into the case of *Brookes* v. *Kent*, as decided in the Privy Council, and into the other

[1] See *Price* v. *Maxwell*, 28 Pa. 23 (1857).

cases which have followed it. It is not easy to discriminate in which cases an erasure, perfect on the face of the will, shall be fatal to a bequest contained in it, and in which not. I should have had greater difficulty in coming to a decision, if a pecuniary interest had been affected, than I have in the appointment of executors.

DICKINSON *v.* SWATMAN.

COURT OF PROBATE. 1860.

[*Reported* 4 *Sw. & Tr.* 205.]

WILLIAM DICKINSON, the deceased in this case, died on the 1st of May, 1860. The plaintiff, Rebecca Dickinson, as executor, propounded a will, dated April 28th, 1826. The defendant pleaded, amongst other pleas, the revocation of this will by a later will, dated July 14th, 1851. The plaintiff replied that, after the execution of the last will, the deceased revoked the same by tearing and burning it when of sound mind. Issue joined.

The cause came on for hearing before the court itself.

Dr. Deane, Q. C., and *Mr. Douglas Brown*, for the plaintiff.

Dr. Phillimore, Q. C., and *Mr. Mandell*, for the defendant.

SIR C. CRESSWELL. To make this a case of dependent relative revocation, you must introduce the ingredient that the deceased intended that, unless the will of 1826 stood, the will of 1851 was to stand. If he intended to make a new will, the doctrine would not apply. This question may also be suggested, namely, whether he would rather have no will at all than the will of 1851. Is there any case in which the doctrine of dependent relative revocation has been applied where the act of cancellation has been done with reference to a bygone act, where a new will, duly executed, has been destroyed, with a desire to set up an old will?

Dr. Phillimore. I can cite no authority. The principle is laid down in *Hine* v. *Thason.*

SIR C. CRESSWELL. I am clearly of opinion that the deceased intended entirely to revoke the will of 1851. The will of 1826 was not the last will of the deceased, and that of 1851 was revoked. It is a proper case for costs to come out of the estate.

Intestacy pronounced for.

GOODS OF EELES.

COURT OF PROBATE. 1862.

[*Reported* 2 *Sw. & Tr.* 600.]

THOMAS EELES, late of Carlton, in the county of York, stone-mason, deceased, died on the 17th of May, 1862. On the 28th of August, 1859, the deceased duly executed a will in the presence of two attesting witnesses, and of his wife, Elizabeth Eeles.

Some considerable time after the execution of the will, the deceased, in the presence of his said wife, cut out of the said will a piece on which was written the word "witnesses," and the names Thomas Wake and John Leng, being the signatures of the attesting witnesses, and at the same time gave as his reason to his wife for having so cut the said will, that he had some idea of altering it and having a new will made. Later on in the same day, the deceased, in the presence of his wife, re-fastened to the said will the piece he had cut out by plastering pieces of paper at the back thereof, saying, when he replaced the piece of paper, that the will would do for the present, and that, if he wanted another one made, he could do it afterwards. Application had been made to the registrar of the District Registry at York for probate of the said will, upon the special affidavit of Elizabeth Eeles, and he had transmitted the papers in the case to the Principal Registry.

Dr. Spinks moved the court to grant probate of the will to the executors named therein. The testator had given a reason for cutting the piece out of the will, namely, that he was going to make a new will in substitution for it; but he did not do so. He could only have intended to cancel the will conditionally, and, not having carried out his intention of making a new will, the old will stands.

SIR C. CRESSWELL. With the consent of the parties interested in case of intestacy, I will grant probate of this will on motion. The nearest case to it I have found is *In the Goods of De Bode*, 5 Notes of Cas. 189. There the testator did something equivalent to what was done by the deceased in this case.

GOODS OF MITCHESON.

COURT OF PROBATE. 1863.

[*Reported* 32 *L. J. N. S.* (*P. & M.*) 202.]

WILLIAM MITCHESON, late of Poplar, died on the 5th of February, 1863, a widower, leaving three children, Arabella Mitcheson, William Mitcheson, and Julia Moncaster Mitcheson, who were minors. On the

27th of June, 1856, he duly executed a will, in the presence of his solicitor, Mr. Humphrey, and his clerk, whereof he appointed his brother, Moncaster Mitcheson, and William James Flemming, executors. In January, 1861, the deceased instructed Mr. Loxley, a solicitor, to prepare a will for him, but did not tell him that he had previously made one. The draft of the new will was sent to the deceased on the 19th of January, 1861. At this time, one of the executors of the earlier will was dead, and the other had said that he should not be able to act. After the receipt of the draft will, the deceased's daughter Margaret died, which affected some of the deceased's testamentary intentions. The draft was never finally settled. On the 25th of January, 1863, the deceased remarked to a clerk of Mr. Loxley's, that it was high time the new will was settled, and appointed an early date for going through it with the clerk, but he did not keep the appointment, and died a week afterwards. About eight months before his death the deceased was asked by his brother, whether he had arranged his affairs; he replied that he had, and had made his will, and about two or three months before he died, the deceased told his sister-in-law, Miss Smith, who took care of his children, that he should destroy his old will. On his death, search was made, but only the draft will of 1861 could be found.

Dr. Phillimore and *Dr. Spinks*, for the executors, now asked for probate of the draft of the will of 1856.

Dr. Deane, for Margaret Smith, the curatrix or guardian of William Mitcheson, one of the children of the deceased.

Sir C. Cresswell. I cannot grant probate of the draft of the will of June, 1856. The will having been in the possession of the deceased, and not having been found after his death, the presumption is, that it was destroyed by him, *animo revocandi*. That presumption must prevail unless rebutted by evidence. So far from there being such evidence, there is some evidence which tends to confirm the presumption. There is nothing to show that the will was destroyed because the deceased intended to make another, or that its destruction was dependent upon the making of another.

Probate refused.

POWELL *v.* POWELL.

Court of Probate. 1866.

[*Reported L. R.* 1 *P. & D.* 209.]

Sir J. P. Wilde.[1] The testator in this case made a will on the 3d of March, 1862, and a second will, revoking the first, on the 29th of March, 1864. In 1865 he destroyed the will of 1864, and the question

[1] The opinion only is here given.

is, whether, by that act of destruction, the will of 1864 has been legally revoked, seeing that his object in the act of destruction was to set up the will of 1862. It is not contended that effect could be given by law to this object, but failing that, it is argued that effect ought not to be given to the destruction of the will of 1864 as an act of revocation. I conceive that the doctrine of dependent relative revocation properly applies to facts such as this case involves. This doctrine is based on the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is, therefore, necessary in each case to study the act done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied. For unless it be done *animo revocandi*, it is no revocation. What, then, if the act of destruction be done with the sole intention of setting up and establishing some other testamentary paper, for which the destruction of the paper in question was only designed to make way? It is clear that in such case the *animus revocandi* had only a conditional existence, the condition being the validity of the paper intended to be substituted, and such has been the course of decision in the various cases quoted in argument. But then it is said, that this method of reasoning has only hitherto been applied to cases in which the destruction of the script has accompanied the execution of the instrument intended in substitution; and that no decided case can be found in which the instrument intended to be established has been a long previously executed paper. But I fail to perceive a distinction in principle between the two cases. For what does it matter whether a testator were to say, "I tear this will of 1860 because I have this day (1st of January, 1861) executed another designed to replace it;" or, "I tear this will of 1860 because I desire and expect that the effect of my so doing will be to set up my old will of 1840?" In either case the revocatory act is based on a condition, which the testator imagines is fulfilled. In both cases the act is referable, not to any abstract intention to revoke, but to an intention to validate another paper; and as in neither case is the sole condition upon which revocation was intended fulfilled, in neither is the *animus revocandi* present. It is only necessary to add that, in the above observations, it has been assumed that the act of destruction was referable, wholly and solely, to the intention of setting up some other testamentary paper. And such was, I think, upon the evidence given in this case, the reasonable conclusion of fact. Cases may, and probably will, arise in which the intention is either mixed or ambiguous, and such are for future consideration. The only case cited that requires special mention is that of *Dickinson* v. *Swatman*, 30 L. J. (P. M. & A.) 84. But Sir C. Cresswell, in that case, does not appear to have been satisfied that the sole intention in destroying was to set up the previous will. He is reported to have said, "At all events, to make it a case of dependent relative revoca-

tion, you would have to show that he did not intend to revoke the second will unless by doing so the first would have been revived."

The court pronounces, therefore, for the will of the 29th of March, 1864, as contained in the draft thereof produced and sworn to by Mr. Newman, the attorney who made it.

The costs of all parties out of estate.

Bayford appeared for the plaintiff and the intervener.

Dr. Tristram, for the defendant.

QUINN *v.* BUTLER.

CHANCERY. 1868.

[*Reported L. R.* 6 *Eq.* 225.]

RICHARD FOWLER BUTLER was, under the will of his father Thomas L. Butler, empowered by deed or will to charge certain hereditaments thereby devised with the payment of any sum or sums of money not exceeding £7,000 as a provision for his younger children, the same to go and be paid to or divided among them in such shares as the said Richard Fowler Butler by deed or will should appoint, and in default of such appointment to go to and be divided amongst all such children equally.

Richard Fowler Butler, by his will, dated the 13th of November, 1856, after reciting the above-mentioned power, in exercise thereof charged the said hereditaments with the payment of the sum of £7,000 in manner thereinafter mentioned (that is to say), £4,000, part thereof, to be paid to his son, Robert Henry Fowler Butler, in case he should attain the age of twenty-one years: and the sum of £3,000, residue thereof, to be paid to his said three daughters, Eleanor Quinn, Sarah Fowler Butler, and Mary Fowler Butler, in equal shares as tenants in common, and in case of the decease of the said Robert Henry F. Butler, before he should have attained the age of twenty-one years, then the said sum of £4,000 to be paid to and divided amongst his said three daughters in the like manner as the said sum of £3,000.

By a codicil, dated the 7th of September, 1861, Richard Fowler Butler, after reciting the appointment made by his will, proceeded as follows: "I hereby revoke and make void the bequest and appointment or charge of the said sum of £7,000 so made by my said will as aforesaid; and I, the said R. F. Butler, in exercise and by force and virtue of the powers or authorities given me in the said will of the said T. L. Fowler, and of all other powers enabling me in this behalf, do hereby subject, charge, and make liable all and every the manors, messuages, farms, lands, and hereditaments devised by the said will of the said T. L. Fowler, to and with the payment to my son Robert F. Butler,

who has attained the age of twenty-one years, of the sum of £7,000 sterling money, and in all other respects I confirm my said will."

The suit was instituted by Eleanor Quinn and her husband for the purpose (amongst others) of obtaining a declaration that Eleanor Quinn was entitled to have her share under the will of Richard Fowler Butler raised out of the hereditaments on which the £7,000 was charged; and it now came on to be heard upon further consideration.

Mr. Baggallay, Q. C., *Mr. Eddis*, and *Mr. Winn* (of the Irish Bar), for the plaintiffs.

Mr. Southgate, Q. C., for Sarah Fowler Butler and Mary Fowler Butler, stated that they declined to claim any benefit under the will of Richard Fowler Butler.

Mr. Jessel, Q. C., and *Mr. North*, for Robert Fowler Butler, who, by the death of an elder brother, had become entitled to the estates charged with the payment of £7,000.

Mr. Bristowe, for trustees.

Lord Romilly, M. R. In this case I am of opinion that the codicil is a simple revocation of the appointment made by the will, and nothing more.

I think the whole question depends on the intention of the testator. If a will is simply revoked in order to make a gift in favor of another person, and you can see that there is no intention to revoke unless for that purpose, then the doctrine of *Onions* v. *Tyrer*, 1 P. Wms. 343, applies. The case has generally arisen where there has been a defective execution of the second instrument.

Here there can be no doubt that the intention was to revoke the will altogether. The codicil is an absolute and positive revocation of the charge: then there is a new charge of £7,000, and the whole of that is given to the son. That gift is void, because the testator had not an exclusive power of appointment. I entirely assent to the observation of Lord Justice Page Wood in *Tupper* v. *Tupper*, 1 K. & J. 665, where he remarks that the testator expressly says by the codicil that the legatees shall not receive anything, but that the fund shall be given to another object; and that although this latter person cannot take the gift, the court cannot speculate on whom the testator might have wished to confer the benefit in such an event. That case was decided on an old case, *French's Case*, in Rolle's Abridgment, Devise, O. 4, to the same effect.

I think it is impossible to draw a distinction so technical as to say that the codicil shall prevail or not according as the person named in it can take or not. The reasonable view is to consider the intention of the testator; and here I think the codicil revoked the old appointment and charge, but did not set up a new one.[1]

[1] See *Hairston* v. *Hairston*, 30 Miss. 276 (1855).

GOODS OF McCABE.

COURT OF PROBATE. 1873.

[*Reported L. R.* 3 *P. & D.* 94.]

ESTHER JEREMY McCABE, late of Ticehurst, Sussex, spinster, died on the 3d of March, 1873, having made a will dated the 27th of August, 1863, in which she appointed Robert Jeremy McCabe sole executor. The will was found by deceased's sister, Mrs. Laming, after the death of Miss McCabe, in a davenport in Mrs. Laming's house, the property of the deceased. It was in an envelope which had been sealed, but the seal had been broken. The will was entirely in the handwriting of the deceased, and contained the following clauses: "After payment of all the above legacies, I will and bequeath to my sister Caroline Jeremy Luro half of the sum of money remaining undisposed of, and to my *sister Louisa* Galsworthy the remaining half of the same sum . . . To my *sister Louisa Jeremy Galsworthy* I leave, as a remembrance, the print hanging at present in my bed-room. And the whole of the remainder of my personal effects and property of whatsoever nature, excepting any sum of money which may remain after payment of all the above-mentioned legacies, I leave to my *nieces and nephews*." The words in italics were written on erasures, but the attesting witnesses could give no information or explanation whatever in reference to them. Messrs. Chabot and Netherclift were of opinion that the words written under *sister Louisa*, in the first paragraph, were *niece Edith*. Mr. Galsworthy, in his affidavit, stated that at the date of the will, the 27th of August, 1863, his wife Louisa Galsworthy was seriously ill, a fact well known to the testatrix, and it was not expected either by her husband, by the testatrix, or any other member of the family, that she would recover; and that he had no doubt that by reason thereof the testatrix believed that any bequest of a share of her property to her sister would be inoperative, and she determined to give such share to Louisa Galsworthy's only child Edith, to whom testatrix was much attached. At the end of the year 1864 Louisa Galsworthy completely recovered from her illness, and the fact of such recovery was known to the testatrix, who visited her sister in 1865. In consequence of the recovery of her sister, the testatrix probably erased, or attempted to erase, the words *niece Edith* from the will, in order to substitute in the place thereof the name of her sister, and in consequence of the space being insufficient for the full name, left out the word Jeremy, which in other cases she had always used. Louisa Galsworthy died in October, 1866, and from that time the testatrix was incompetent to manage her affairs, or make a new will.

June 10. *Dr. Tristram*, for the executor, applied for probate. As there is no evidence at what time the words inserted were introduced,

the presumption is that they were so after execution, and they will be omitted; and as there is no satisfactory evidence what the words erased were, the probate will go in blank as to them.

Dr. Deane, Q. C., *Dr. Spinks*, Q. C., and *Inderwick*, appeared for Miss Edith Galsworthy and other parties interested.

Cur. adv. vult.

June 24. Sir J. Hannen. By the will of the testatrix, as found at her death, half the residue of her money was left to her sister Louisa Galsworthy; the words *sister Louisa* were written on an erasure, and as the attesting witnesses could give no explanation of the alteration, these words must be rejected. But it is alleged that the words erased were *niece Edith*. It is stated by Messrs. Chabot and Netherclift that they can, with the assistance of a magnifying-glass, read these words beneath those which are substituted. I have myself carefully examined the will with the aid of a powerful glass, and I am unable to discover what these gentlemen say they see. If this were a case of simple obliteration, I should not be able to act upon the evidence of these experts, for the Statute of Wills gives no effect to obliterations, except so far as the original words shall not be apparent. And this has been decided to mean, "apparent on an inspection of the instrument," not "apparent by extrinsic evidence:" *Townley* v. *Watson*, 3 Curt. 761. But as this is a case not merely of obliteration, but of substitution, I am at liberty to inquire whether the testatrix did not intend only to revoke the original bequest, on the supposition that she had effectually substituted another. This is established by the cases of *Brooke* v. *Kent*, 3 Moo. P. C. 334; *In the Goods of Harris*, 1 Sw. & Tr. 536; *In the Goods of Parr*, 29 L. J. (P. M. & A.) 70; 6 Jur. (N. S.) 56. In the last-named case Sir C. Cresswell expressed a doubt whether the doctrine of dependent relative revocation could be applied to cases where not merely an appointment of a fresh executor was attempted, but a new legatee was substituted; but the judgment of Sir W. Grant, in the case *Ex parte Earl of Ilchester*, 7 Ves. 372, shows that the doctrine is equally applicable where the later invalid will or bequest is in favor of a different person to the one named in the earlier. The designation of a fresh legatee is, no doubt, an important circumstance to be considered in determining the question of fact, whether the destruction or obliteration was intended to be dependent on the efficacy of the substituted disposition; but where that is clear, the nature or extent of the contemplated alterations are immaterial. This is well illustrated by the circumstances of the present case. If the words written on the first erasure be rejected, the bequest in the will will run thus: "*to my* ——— *Galsworthy.*" This makes it clear that the bequest was to some connection of the deceased of the name of Galsworthy. Her only relatives of that name were her sister, her sister's husband, and her sister's daughter. The facts stated in the affidavit of Mr. Galsworthy make it in the highest degree probable that the

bequest was not originally made to the deceased's sister, because she was then dangerously ill and expected to die. In this state of things, it was natural that the bequest should be made to one of her family, as it is clear it was, but it cannot be supposed that the testatrix intended to revoke a bequest made under such circumstances absolutely, and without reference to her desire to substitute the name of her sister, who had been restored to health. I cannot have a doubt that she would not have obliterated the name of that member of her family of the name of Galsworthy, which originally stood in the will, if she had not believed that she could validly substitute the name of her sister; and if this be so, the doctrine of dependent relative revocation is applicable, and I am at liberty to have recourse to any means of legal proof to establish what the obliterated words were. In this inquiry I accept the evidence of the experts to this extent, namely, that that which is visible of the remains of the letters which are obliterated is consistent with the theory that the words were *niece Edith*, and inconsistent with the theory that they were *brother-in-law*, or any other words which can be reasonably suggested to fill up the blank between *my* and *Galsworthy;* and taking this in combination with the other evidence as a whole, I come to the conclusion that the words obliterated were "niece Edith," and I direct probate with those words restored. The other words written on erasures, not being accounted for, must be rejected.[1]

GOODS OF HORSFORD.

COURT OF PROBATE. 1874.

[*Reported L. R.* 3 *P. & D.* 211.]

GEORGE FAHIE HORSFORD, late a captain in Her Majesty's service, unattached, on the 1st of April, 1868, executed a will which was written on two sheets of foolscap paper. The writing covered five sides of the paper, terminating at the bottom of the fifth side, with a full attestation clause where the witnesses signed their names. At the top of the sixth side were the words, "To which will and testament I hereunto annex my seal and signature, dated this 1st day of April, in the year of our Lord 1868. — GEO. F. HORSFORD, Captain unattached." Pieces of paper were pasted over certain parts of the will with writing on them, as appears in the paragraphs following in italics: "I leave the interest on £309 9*s.* 6*d.* bank stock to my god-child, Rosina Horsford Wood; and in case of her death unmarried or, if married, childless, then to my brother, Sir Robert Marsh Horsford, Knt., C. B., for

[1] See *Simmons* v. *Rudall*, 1 Sim. N. S. 115 (1851); *Wolf* v. *Bollinger*, 62 Ill. 368 (1872). Cf. *Pringle* v. *M'Pherson*, 1 Brev. 279 (1809), p. 347, note, *ante*.

his lifetime, and afterwards the interest to my cousin Amelia Thorpe, widow of Colonel Thorpe, formerly of the 89th Regiment; and after her death the principal of the said bank stock *to Mary Ffinch, the eldest daughter of John Ffinch of Greenwich, Esquire, deceased.* I also leave and bequeath to my adopted god-child, Rosina Horsford Wood, for her sole use during her lifetime, the interest of the sum of £174 2*s.* 3*d.* reduced 3 per cent annuities, and, if she marry and have children, the principal to them after her decease. In case she should die single, or, if married, childless, the interest of the said amount will revert to my brother, Sir Robert Marsh Horsford, Knt., C. B., and then to my cousin, Amelia Thorpe, &c., and after her death the principal *to Mary Graham, daughter of the Rev. Leonard Graham, who married Lavinia Horsford.*" Sir Robert Marsh Horsford was appointed executor. On the 29th of July, 1874, the deceased executed a codicil to his will in the following manner. It was written on a sheet of foolscap paper, the writing covering the first and half the second sides of the sheet. Attached by a string, passing through the fold of the sheet about opposite to the termination of the writing, was a separate paper on which was written, "To which codicil I hereunto annex my seal and signature, dated this 29th day of July, 1874." This was followed by the signatures of the deceased and of the witnesses, Captain Hedley and Mrs. Bourne. The contents of the codicil, so far as material, were as follows: "Febry., 1870. Codicil to the will of Captain George Fahie Horsford. Should anything occur to prevent from death my will acting in any way I have stated, I leave and bequeath to Mrs. George Davies, formerly Rosina Horsford Wood, 82 Blake Street, Barrow-on-Furness, Lancashire, should she survive any children she may have, or in the event of her not having any, the whole of the money invested in my name in the different funds of the Bank of England, together with my bank stock, for her sole use. I leave and bequeath *ten* pounds, *which will be found* with my photograph, to Emily Bush, the youngest daughter of Lieut.-Colonel J. T. Bush, late of the Honble. E. I. Service, Bengal Army, as a remembrance for kindly coming to see me when she was a little girl!" The words in italics were written on pieces of paper pasted over the original writing of the codicil. The witnesses, Captain Hedley and Mrs. Bourne, who attested both documents, in their affidavit, stated that at the execution of the will they had no opportunity of observing the earlier pages of it, and did not notice whether the strips of paper now pasted thereon were there at the time of attestation. That, as regards the codicil, they subscribed their names in the presence of the deceased and of each other, having been requested by testator to attest his signature thereto. That they did not see the will at the time of the execution of the codicil. That the codicil is now in the same plight and condition as it was at the time of attestation, save that they did not see the first page of the said codicil, and they are unable to say what was written on that page nor whether the pieces of paper were pasted on, or if anything was written thereon. That

the writing on the second page of the codicil was then about the same as now.

The court, not being satisfied on the affidavit as to the due execution or plight of the codicil, directed the attendance of the witnesses in court. On the 1st of December they were examined. Captain Hedley stated that he knew Captain Horsford, who had asked him on two occasions to witness papers. That in the summer of this year he was present in deceased's room. Mrs. Bourne, the landlady, was also there. He, Mrs. Bourne, and Captain Horsford, were only present. Deponent asked no questions. He could not say whether he saw deceased's signature. Deceased asked him to witness a paper. He did not recollect whether there was a name on the paper. It was a sitting-room. Deceased was standing. There were pens and ink on the table. He could not recollect anything else. The deceased asked him to sign, which he did. He believed the paper was then attached as now. He did not notice the deceased's name, or whether the paper was signed. He was not accustomed to business. Mrs. Bourne deposed that Captain Horsford lodged in her house. He had asked her to witness papers twice. In the summer, about July last, he asked her to come into his room with Captain Hedley to sign a paper. She did not see him sign it. It was signed before she entered the room. Captain Hedley was in the room before she was. She saw Captain Hedley sign. Captain Horsford produced the paper. To the best of her recollection all the writing as it now appears on the paper was there when she signed.

Nov. 10. *Nugent* applied to the court to grant probate of the will and codicil. He referred to *In the Goods of Huckvale*, Law Rep. 1 P. & M. 375; *In the Goods of Puddephatt*, Law Rep. 2 P. & M. 97.

Cur. adv. vult.

Dec. 2. Sir J. Hannen. The testator, George Fahie Horsford, deceased, made his will, bearing date the 1st day of April, 1868. It covers four pages of a sheet of foolscap, and continues on the fifth page, being the first of a second sheet. At the bottom of the fifth page is a formal attestation clause, and the signature of the witnesses are added below the clause. The signature of the testator appears at the top of the sixth page, preceded by these words: "To which will and testament I hereunto annex my seal and signature, dated this 1st April, in the year of our Lord 1848." The attesting witnesses state that, to the best of their recollection, the testator showed and acknowledged to them his signature, signed on the will on the upper part of the sixth page of the said paper, and that then they signed the attestation thereof. I think that the execution of the will by the testator is valid, notwithstanding the position of the signature, by virtue of the Statute 15 Vict. c. 24. There is also a codicil, dated the 29th of July, 1874, in which the signature and attestation of the witnesses are on a separate sheet, attached by a string to the codicil. The evidence of the attesting wit-

nesses is not very clear as to what occurred at the time of execution, but I have come to the conclusion that the sheet was attached to the codicil at the time, and that the testator acknowledged his signature to the witnesses before the attestation. A further question arose as to certain obliterations which appear upon the will and codicil, and of which the attesting witnesses were unable to give any account. Strips of paper have been pasted over portions of the original will and codicil, and on some of these strips, words have been written by the testator, by which he has sought to make bequests to several legatees. It is clear that the words so written on the strips of paper must follow the fate of ordinary alterations, and in the absence of evidence showing when they were made, it must be presumed that they were so added after the execution of the will and codicil. But ought I to treat the words over which the pieces of paper are pasted as effectually obliterated, and grant probate of the will or codicil with the hidden passages in blank, or ought I to endeavor to ascertain what words have been covered up, and include them in the probate? As to the will, the answer to these questions depends upon the construction to be put on the twenty-first section of the Statute 1 Vict. *c.* 26, by which it is enacted that no obliteration, interlineation, or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will. Soon after the passing of the Act, Sir H. J. Fust, in *Townley* v. *Watson*, 3 Curt. 761, decided that the construction to be put upon the words of the twenty-first section was that the effect of the will before the alterations must be apparent on the face of the instrument itself. He said: "What is an obliteration? Is it not by some means covering over words originally written, so as to render them no longer legible? I cannot understand, if the Legislature really intended that extrinsic evidence should be admitted, why a few more words were not added, which would have freed the section from all doubt; for instance, why was it not thus penned: 'unless the words shall be capable of being made apparent'?" I think it is impossible to read the words of the Statute, and not say that it was the intention of the Legislature that, if a testator shall take such pains to obliterate certain passages in his will, and shall so effectually accomplish his purpose that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid as if done according to the stricter forms mentioned in the Act of Parliament. Mr. Justice Williams (Executors, page 139, 6th ed., in a note) says: "In a case before Sir H. J. Fust, he ordered that the erasures in a will should be carefully examined in the registry with the help of glasses, by persons accustomed to writing, to ascertain whether the words could be made out, and directed that probate should pass with the erased passages restored, unless they could not be made out, and then with those parts in blank. Generally speaking, the Ecclesiastical Court

will not in the first instance take upon itself to decide whether the words obliterated can or cannot be made out. It must be proved." But it has not been the practice to adopt any means of ascertaining what the words attempted to be obliterated were, other than mere inspection by aid of glasses. Chemical agents have not been resorted to in order to remove any portion of the obscuring ink, and I do not think it would be proper to adopt such means. I think that the word "apparent" in the twenty-first section means apparent on the face of the instrument in the condition in which it was left by the testator, and that if he has had recourse to extraordinary means to obliterate what he had written, then this court is not bound to take any steps to undo what he had done. The Statute does not draw any distinction between different modes of obliteration. The effacement of the original writing as performed by this testator, by pasting paper over it, is complete, and I can see no reason why the court should remove the pasted paper used as the instrument of obliteration, rather than ink used for the same purpose. I shall therefore give no directions on the subject so far as the will is concerned; and, assuming that the words covered over cannot be ascertained by inspection, the probate must go with those parts in blank. But with regard to the obliterations in the codicil, the case is different. There the amount of a legacy has been obliterated, leaving the name of the legatee untouched. As to this, I am in a position to infer that the testator's intention was only to revoke that portion of the codicil which was covered in the event of his having effectually substituted another bequest in its place, and thus the doctrine of dependent relative revocation becomes applicable. As to these alterations, the court is at liberty to have recourse to any means of legal proof by which to ascertain the original disposition, and amongst such means, the removal of the strips of paper is the most obvious. I therefore direct that the strip on which is written the word *ten*, as well as the strip on which are written the words *which will be found with* (to which the same remarks are applicable) be removed in the registry from the codicil, and that probate be granted of that instrument in its unaltered condition.

SEMMES *v.* SEMMES.

COURT OF APPEALS OF MARYLAND. 1826.

[*Reported* 7 *H. & J.* 388.]

APPEAL from a decree of the Orphans Court of Charles County, refusing to admit to probate and record a paper offered as the last will and testament of Ignatius Semmes, deceased.

The cause (which is sufficiently explained in the opinion delivered by this court) was argued before BUCHANAN, C. J., and EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, JJ.

Stonestreet, for the appellant.

C. Dorsey and *Brawner*, for the appellees.

Taney, in reply.

Buchanan, C. J., delivered the opinion of the court. It is objected, on the part of the appellant, that the Orphans Court did wrong in not admitting to probate a paper, purporting to have been a duly executed will of Ignatius Semmes, on two grounds: First. Because the obliterating the name of Ignatius Semmes, and also the names of the three subscribing witnesses, does not appear to have been done by the deceased; and secondly: That if it was, it did not amount to a revocation of the will.

With respect to the first proposition, it does not appear to admit of a doubt, that each obliteration was made by the deceased Ignatius Semmes.

The *memorandum* at the foot of the paper, and just below the signatures, in these words — "In consequence of the death of my wife, it is become necessary to make another will," and signed Ignatius Semmes, is admitted to be in his handwriting. The obliterations were made by drawing a pen frequently, and in different directions, across his own signature, and the names of the subscribing witnesses; and the ink with which it was done, is proved to have been the same with which the memorandum at the foot of that paper was written. Hence it is manifest, that the obliterations, and the memorandum, were simultaneous acts, and by the deceased himself; and it would be straining overmuch to admit the supposition, that it might have been surreptitiously done by another, in the absence of any testimony to cast the slightest shade of suspicion upon anybody. The memorandum must be considered as connected with the obliterations as a part of the *res gesta*, and as explanatory of the transaction. It is equivalent to a declaration, that he had made the obliterations, for the reason assigned (the death of his wife), which made it necessary to make another will.

Considering then the obliterations to have been made by the deceased, the second objection presents itself, to wit, that the will was not thereby revoked; in support of which several authorities were cited and relied on in argument, but none of them sustain the proposition, and it would be somewhat strange if they did.

In *Onions* v. *Tyrer*, 1 P. Williams, 343, the deceased, by a will duly executed to pass real estate, devised lands to trustees, to certain uses, and afterwards made another will devising the same lands to other trustees, but to the same uses, with a clause of revocation of the first, and attested by three witnesses, who did not sign their names in the presence of the testator. Supposing the second will to be duly executed to pass real estate, the testator caused the first to be cancelled. But it was determined, that the witnesses to the second, not having signed their names in the presence of the testator, it was void as to the land, and could not therefore have the effect to revoke the former; and the cancelling of the first will, under the presumption that the second was

good and effectual, was held not to amount to a revocation of it, on the ground that it was done by mistake. The case of *Hyde* v. *Hyde*, 8 Vin. Ab. 142, was clearly a case of mistake. And the case of *Mason* v. *Limbrey*, cited by Lord Mansfield, in 4 Burr. 2515, was decided on principles not at all applicable to this case.

The cancelling of a will is said to be an equivocal act, and not to effect a revocation, unless it is done *animo revocandi*. And where it is a dependent relative act, done with reference to another, which is meant and supposed to be good and effectual, it may be a revocation or not, as that to which it relates is efficacious or not. As where a man having duly executed one will, afterwards causes another to be prepared, and supposing the second to be duly executed, under that impression alone cancels the first. In such case it has been held, that on the second turning out not to have been duly executed, the cancelling the first, being done by mistake and misapprehension, would not operate as a revocation. But never where a man has deliberately and intentionally cancelled his will, as in this case, in the entire absence of all accident or mistake, notwithstanding he may, at the time, have intended to make another will.

It is said, and indeed it would seem from the testimony, that Ignatius Semmes did not intend to die intestate, but however that may be, we cannot make a will for him. By the will, which is now attempted to be set up, he had disposed of the whole of his estate to his wife, in trust for the "use and support of herself, and the benefit, education and support," of his infant son until he should arrive at the age of twenty-one years, when he bequeathed one half of his personal property absolutely to his wife; but she dying, he struck out his own signature, and the names of the subscribing witnesses, and made a memorandum at the bottom of the will, assigning as a reason for what he had done, that his wife's death had rendered it necessary to make another will. If that was not a revocation, it would be found difficult to revoke a will by cancelling. In *Burtenshaw* v. *Gilbert*, 1 Cowp. 49, which was cited in argument, there were two wills, and after the death of the party, the second will, with a duplicate of the first, which he had kept himself, were found together among his papers both cancelled; and it was proved that he had sent for an attorney to prepare another will, but lost his senses before it could be done. It was not doubted that the second will was revoked. The only question raised, was whether the revocation of the second will did not set up the uncancelled duplicate of the first, and it was determined that it did not. That case surely cannot be called in aid of this will.

Decree affirmed.[1]

[1] See, *accord.*, *Banks* v. *Banks*, 65 Mo. 432 (1877).

GIFFORD *v.* DYER.

SUPREME COURT OF RHODE ISLAND. 1852.

[*Reported* 2 *R. I.* 99.]

THIS was an appeal from a decree of the Court of Probate of Little Compton, proving and approving the last will and testament of Abigail Irish. The will was dated December 4, 1850, and the testatrix died December 6, 1850. After several bequests of small sums to the children of Robin Gifford and to others, she gives and bequeaths the rest and residue of her property, one half to John Dyer, who was her brother-in-law, and the other half to her two nephews, Jesse and Alexander Dyer. Robin Gifford, the only child of the testatrix, was not mentioned in the will. It appeared in evidence, that at the date of the will, Robin Gifford had been absent from home, leaving a family, for a period of ten years, unheard from; that all the neighbors considered him dead, and that his estate had been administered upon as of a person deceased. The scrivener who drew the will, testified as follows: "After I had read the will to her, she asked if it would make any difference if she did not mention her son. I asked if she considered him living. She said she supposed he had been dead for years; she said, if it would make any difference she would put his name in, for they will break the will if they can. I think that was the expression she used. I think she said what she had given to her grandchildren was in lieu of what he would have, but am not positive. I think her son left in 1841, and was not heard of to my knowledge. She was speaking of a home at Mr. Dyer's and said, what she had given him would pay him well. She said her grandchildren had not been to see her while she was sick." It appeared that the testatrix had resided with John Dyer for some time previous to her death.

Sheffield, for the appellant.

A. C. Greene, for the appellee.

GREENE, C. J., delivered the opinion of the court. It is very apparent in the present case, that the testatrix would have made the same will, had she known her son was living. She did not intend to give him anything, if living.

But if this were not apparent and she had made the will under a mistake as to the supposed death of her son, this could not be shown *dehors* the will. The mistake must appear on the face of the will, and it must also appear what would have been the will of the testatrix but for the mistake. Thus, where the testator revokes a legacy, upon the mistaken supposition that the legatee is dead, and this appears on the face of the instrument of revocation, such revocation was held void. *Campbell* v. *French*, 3 Vesey, 321.

SKIPWITH *v.* CABELL.

COURT OF APPEALS OF VIRGINIA. 1870.

[*Reported* 19 *Grat.* 758.]

BILL in equity [1] filed in equity by D. J. Hartsook, the executor of Mary W. Cabell, of Nelson County in Virginia, to obtain a construction of her will and codicils, and to have the direction of the court in the administration of her estate.

By the will, which was dated in 1859, the testatrix gave about fifty legacies. One of these was of $1050 "to my friend Mrs. Fanny Taylor of Philadelphia." There were several codicils. By the second codicil, dated at the beginning February 28, 1861, and at the end August 18, 1861, after several legacies she gave $1000 to Miss Cornelia Taylor of Philadelphia, $2000 to Mrs. Lewis of Philadelphia, and then added: "In case of a sudden and unexpected death, I give the remainder of my property to be equally divided between my cousin Dr. Carter of Philadelphia, and my cousin Peyton Skipwith of New Orleans; one half of which each must hold in trust for the benefit of their children." The sixth and last codicil, dated November 27, 1861, provided as follows: "In consequence of the state of the country, I now revoke my bequest to Dr. Charles Carter and his children, and also to Mrs. Fanny Taylor, and also to Miss Fanny Lewis, all of them residents of Philadelphia." The testatrix died in December, 1861.

Hartsook, the executor, testified as follows: —

"Some time before her (Mrs. Cabell's) death, I was at her house, and she said she had made her will and had written it so plain that no difficulty could be made; and said she wanted the persons to whom she had given her property to get it as soon after her death as possible. I remarked to her, that under the Sequestration Act, if she had given property to any of her Northern friends, it might be confiscated, and that I mentioned it for her consideration. She thanked me, and said she had, and that she would revoke the bequests. On visiting her the next time, she remarked that she had revoked the bequests to her Northern friends on account of the state of the country. I then asked her if she had made any disposition of the property given in these revoked bequests, or whether she had any residuary clause to her will which would take it. She replied she had a residuary clause; and that would do. I told her that perhaps it would not. She replied, Well, I cannot help it now. She was suffering greatly and very feeble."

The Circuit Court held that the revocation in the codicil of November 27, 1861, took effect. Dr. Carter appealed.

[1] The following statement is substituted for that in the report, and only that part of the case which touches the question of revocation is given.

Howison, for Dr. Carter.

Baldwin, Lyons, Young, Halyburton, Gites, and *J. Alfred Jones*, for other parties in interest.

JOYNES, J. The second codicil is dated, at the beginning, February 28, 1861, and at the end is the date August 18, 1861. On the 27th day of November, 1861, the testatrix made a sixth codicil, as follows:

"In consequence of the state of the country, I now revoke my bequests to Dr. Carter and his children, and also to Mrs. Fanny Taylor, her daughter Miss Cornelia Taylor, and also to Miss Fanny Lewis, all of them residents of Philadelphia." It is contended on behalf of Dr. Carter and his children, that this revocation is inoperative and void, because made under a mistake. To establish the alleged mistake, they refer to the testimony of Mr. Hartsook, who says that in a conversation with the testatrix, he suggested to her, for her consideration, that if she had given property to any of her Northern friends, it might be confiscated under the Sequestration Act [of the Confederate States] — that she replied, that she had done so, and would revoke the bequests; and that she subsequently told him that she had revoked the bequests to her Northern friends, in consequence of the state of the country. The alleged mistake is, that she supposed that these legacies, if not revoked, would or might be confiscated, whereas, it is insisted, the Sequestration Act was wholly void in law; and, moreover, did not confiscate the *corpus* of any property, but only sequestered the profits.

The most that can be made of this evidence is, that the testatrix had been advised by the witness, as his opinion, that the legacies referred to would be liable to confiscation, and that she adopted that opinion by making the revocation. But it is laid down, that if a revocation is made dependent upon the information received by the testator, or upon his belief or opinion, the act will be held valid, notwithstanding he may have been misinformed, or under a misapprehension. 1 Redfield on Wills, 358, pl. 25. It is as if she had said, "I have been advised that these legacies will be liable to confiscation, and, to avoid all risk, I revoke them." She chose to make the revocation because she had been so advised, but she does not put it on the soundness of the advice, and the revocation cannot be set aside by showing that the advice was unsound. 1 Powell on Devises, 527; *Atto. Genl.* v. *Lloyd*, 3 Atk. R. 551. Besides, it has not been shown that the testatrix was under any mistake. The counsel admits that the profits of the legacies would have been liable to confiscation, or to sequestration, which was practically the same thing: and this may have been just what she apprehended. We ought to presume so, if this was the only sort of confiscation that was lawful or usual. And if she apprehended confiscation of the whole, it has not been shown that the apprehension was unfounded.

But the codicil does not state any fact upon the supposition of whose existence the testatrix proceeded in making this revocation. All that

she says is, that she revokes the bequests, "in consequence of the state of the country." What there was in the state of the country that caused her to do so, or what she thought or feared in regard to the state of the country, does not appear on the face of the will. In the cases cited by counsel, the fact which the testator assumed to exist, and the assumed existence of which induced the revocation, appeared on the face of the will. But here we are asked to go outside of the will, and to ascertain from parol evidence what were the particular views and opinions of the testatrix, so as to lay the foundation for a case of mistake. No case has been found in which this has been allowed, and to allow it would violate fundamental principles.

The Circuit Court, therefore, was right in holding, that the revocation was valid and effectual.[1]

NOTE. — On dependent relative revocation see also *Newton* v. *Newton*, *post*, p. 437.

D. *Revocation by Circumstances.*

OVERBURY *v.* OVERBURY.

KING'S BENCH. 1682.

[*Reported* 2 *Show.* 242.]

UPON an appeal before sentence to the delegates, IT WAS ADJUDGED, that if a man make his will, and dispose of his personal estate amongst his relations, and afterwards has children and dies, that this is a revocation of his will, according to the notion of the civilians, this being an *inofficiosum testamentum*.

LUGG *v.* LUGG.

KING'S BENCH. 1696.

[*Reported* 2 *Salk.* 592.]

BEFORE a Commission of Delegates. One being single, made his will, and devised all his personal estate to J. S. Afterwards he married, and had several children, and died without other will or disposition, and now *coram Delegatis*, of which TREBY, C. J., was one, it was ruled, that there being such an alteration in his estate, and circumstances so different at the time of his death from what they were when he made the will, here was room and presumptive evidence to believe a revocation, and that the testator continued not of the same mind.

[1] See *Dunham* v. *Averill*, 45 Conn. 61 (1877).

BROWN *v.* THOMPSON.

CHANCERY. 1702.

[*Reported* 1 *Eq. Cas. Ab.* 413.]

J. S., BEING a bachelor, made his will, and devised a legacy of £500 to his brother, and other legacies to other persons, and devised his real estate to Eliz. Close and her heirs, and afterwards intermarries with the same Eliz. Close, and died, leaving her *privement enseint* with a son, without making any alteration in his will; and the main question in the case was, whether this alteration in the testator's circumstances did of itself, without more ado, amount to a revocation of the will. LORD KEEPER [SIR NATHAN WRIGHT] was clear of opinion, that alteration of circumstances might be a revocation of a will of lands as well as of a personal estate; and that notwithstanding the Statute of Frauds and Perjuries, which does not extend to an implied revocation; but no such alteration appears here, for no injury is done to any person; and those are provided for whom the testator was most bound to provide for; and so established the will.[1]

CHRISTOPHER *v.* CHRISTOPHER.

EXCHEQUER. IN EQUITY. 1771.

[*Reported Dick.* 445.]

THIS cause stood for judgment.

MR. BARON PERROT. This bill is brought by the heir at law of Daniel Christopher, deceased, to have a will made by him revoked; to have an account of the profits of his real estate, and an account of his personal estate, and to have an allowance settled for his maintenance upon this case.

Daniel Christopher, by will, dated 17th December, 1757, being at that time a married man, but without issue, devised his real and personal estate to his then wife for life; remainder to his brother, the defendant Christopher in fee, and absolute property.

The wife died in 1761, and on the 10th of November, 1763, the testator married Elizabeth, a defendant in this cause, and died in 1764, leaving his said wife, and one child, the plaintiff, and without having revoked his will.

[1] SIR JOHN TREVOR, M. R., had, in the previous year, held in this case that the will was revoked. See 1 P. Wms. 304, *note*. — ED.

The Baron said, he found he differed in opinion with his brothers; but this he was the less concerned at, as perhaps it might be the means to carry to the last resort a question which he thought of the greatest consequence to the subject, and by these means every court would in future be uniform in their opinion upon it.

That the Spiritual Court had already determined the will in question to be revoked by the alteration of the circumstances, in which the testator was as above mentioned; but he was of opinion it was not a revocation of a will of lands.

Every one knew, he observed, that both before and since the Statutes enabling a man to devise lands, such wills might be revoked by parol, or any other such mode, which manifested an alteration of intent, in the mind of the testator. This let in many inconveniences at the expense of perjury, and occasioned the making of the Statute of Frauds, the preamble of which the Baron stated, and the 5th section of the mode of devising lands, and observed the difference between the penning of the two clauses, relating to revocations of devises of lands, and of personal estate: The first is, an express exclusion of all other manner of revocation; the other is a restriction upon the method of revoking a will of personal estate, by words, or writing, having all other methods existing; the words of the first, are both negative and affirmative, excluding all other manner of revocation, as by accident, &c. He said he could not find any substantial difference between revocations by deed, and by alteration of circumstances; he thought the Statute meant to exclude all parol evidence in every case of revocation, except that necessary one, of the alteration of the attestation of the instrument of revocation, and that the reason of the several cases, why incomplete deeds, as feoffment without livery, bargains and sale without enrolment, release without lease, well put together in Gilbert's Devises, page 93, will operate as a revocation, depends upon this, that wills being ambulatory till the death of the testator, the several informal acts above referred to, countermand, and determine the will; he thought the present case was one within the Statute, and as open to perjury as any other, that is, the dispute concerning the reality of a subsequent marriage, the legitimacy of the children, and that the Statute meant to have an actual, not a presumptive revocation; that it would let in proof of declarations of the testator, that he intended his will to stand, notwithstanding such alterations of circumstances; that in *Parsons* v. *Lanoe*, 1 Ves. 189, Lord Hardwicke, C., seemed not well satisfied with the case of *Lugg* v. *Lugg*, 1 Lord Raymond, 441, that marrying and having children afterwards was a revocation of a will of personal estate; that the case of *Brown* v. *Thompson*, 1 P. Wms. 304; 1 Eq. Ca. Ab. 413, was taken up without argument. He said, he thought the present bill a reasonable one (but did not state in what particular), and relied on the inadmissibility of parol evidence; that in the only instance where it had been received, that of *Brown* v. *Thompson*, two great men, Sir John Trevor and Lord Keeper Wright, differed in what such alteration

of circumstances consisted, as appears in 1 P. Wms. 304, in the note, and observed that from that time (which was in 1701) to the present, there was no determination in favor of any such implied revocation; that there was a great deal in the case which spoke to the feelings of humanity, but still courts could not determine from principles of peculiar hardships; it was their duty *jus dicere, non dare*, and so concluded against the plaintiff.

Mr. Baron Adams. I am of opinion, the alteration in the circumstances of the testator, amounts to an implied revocation; true it is, the testator was married at the time of making his will; but I shall consider that matter, as if he had been then a bachelor.

I hold it as a rule, that wills do not take effect from the time of the execution, but the death of the testator; that till then they are ambulatory.

The doctrine of revocation of wills hath arisen from cases since the Statute of Wills: there can be no revocation, but by express declaration of the testator, or by implication of law; by the latter, by acts done contradictory to, or inconsistent with such wills; upon this principle, that they show the intention, that lands should not pass by such will: even deeds not fully executed, or improperly, as for want of attornment, &c., are a revocation, Rolle's Abridgment, Tit. Devise, fol. 614, 615, not as actual, but implied revocations: so as to inconsistent acts, *Cook* v. *Bullock*, Cro. Car. 49: so by subsequent acts, though the fee returns to, or remains in the testator, Rolle's Abridg. 660; and *Parsons* v. *Freeman*, 3 Atkyns, 741. These cases show how the law watches the intention of the testator, that it should continue as before, until his death.

Thus matters stood until the Statute of Frauds: for no provision being made in the Statute of Henry the 8th, concerning revocation, the judges allowed of parol proof, which being inconvenient, that Statute meant to provide against it; *but left implied* revocations as before.

My learned Brother Perrot thinks this lets in the mischiefs the Statute meant to prevent; I think it doth not; declarations made by a testator lie open to perversion; but in this case, it is not declarations, but facts (as a subsequent marriage, and having children), are to be proved, which are notorious matters.

Before the Statute of Frauds, the will of a single woman marrying afterwards, was held void, 4th Co.; and though there hath been no such determination since the Statute, I doubt not the resolution would be the same.

It must be admitted the Statute is strong, but yet it hath been determined in many cases, that it hath not taken away revocations by implication, *Dister* v. *Dister*, 3 Levinz, 108; and *Lord Lincoln's Case*, 1 Eq. Cases Abridged, 411; *Sparrow* v. *Hardcastle*, 3 Atk. 798, and *Eccleston* v. *Speke*, Carthew Reports, 79. Here the circumstances of the testator are to be considered; when he was without a child he

had left his estate to his nearest relation, his brother; but when he had a child, it became dependent on him for support: moral duty and natural love called upon him to give it a preference to everybody.

It is therefore a *necessary presumption* that he intended his fortune for the benefit of his child; and if a bare alteration by an incomplete feoffment, &c., shall be a presumption of a change of intent, shall not marriage, and a child born be a sufficient presumption?

So it was held in *Brown* v. *Thompson*, 1 Eq. Ca. Abr. 413; and the determination of *Love* v. *Love*, in the Ecclesiastical Court, whereby marriage and the birth of a child are a revocation of a will of a personal estate, is a foundation for us; and this opinion is contradicted by no cases.

In *Parsons* v. *Lanoe*, 1 Ves. 189, there was a child only, without a subsequent marriage. In *Jackson* v. *Hurlock*, Ambl. 487, before Lord Northington, C., a will was made immediately before marriage, and in contemplation of it.

I will not give any opinion, what would be the consequence of a marriage only, or having a child only, after making a will: but in this case, both marriage and issue happening after the will, I think those alterations of circumstances a revocation of the will.

Mr. Baron Smith said he was of opinion that this was an implied revocation of the will; that the oldest method of devising was by custom; next by feoffment to the uses of the last will; then the Statute of Henry 8th gave a general power; then came the Statute of Frauds, which let in a testamentary construction.

That at common law a favorable construction is to be put upon the intent of parties; and in equity, where a man, being *cestui que trust*, having only a daughter, declared that after his death she should have his lands, but had a son afterwards, it was held the son should have the land, as cited in *Shelly's Case*, 1 Co. 100 b.; which case is also cited with approbation since the Statute of Frauds, in 2 Vern. 416; that revocations by operation of law, though not actually, yet were virtually excepted in the Statute of Frauds, as in Levinz, 108, 3 P. Wms. 163 and 170; that the danger of perjury lay in allowing of parol proof of *declarations*, not of facts; and that even under the Statute there must be parol evidence admitted; as where a will is burned, torn, cancelled, or destroyed, by the testator's directions; and so concluded for the plaintiff.

Lord Chief Baron Parker agreed with Mr. Baron Adams and Mr. Baron Smith, and founded himself much on the case cited by Mr. Baron Smith, out of 1 Co. 100 b. and in 2 Vern. 416; and in addition mentioned *Roper against Ratcliffe*, in 1712, 2 Eq. Ca. Abr. 771, where a devise to a papist, though incapable of taking, was held a revocation.

And the court declared that a subsequent marriage, and a child born were a revocation of the will, and that the estate descended to the daughter, subject to the wife's dower; and that the personal estate

was to be divided (agreeably to the determination concerning this will in the Spiritual Court) according to the Statute, and that the plaintiff, the daughter, was entitled to two thirds: and ordered an account accordingly, and directed costs to be paid out of the estate.[1]

KENEBEL *v.* SCRAFTON.

King's Bench. 1802.

[*Reported* 2 *East*, 530.]

This was an issue, directed by the Court of Chancery, to try whether the real estates of James Bradshaw Pierson were well devised by his will, dated 28th Jan., 1795. On the trial before *Lord Kenyon*, C. J., at the sittings after last Trinity Term, a verdict was found for the plaintiff, subject to the opinion of this court on the above question.

J. B. Pierson, by will duly executed and attested, dated 28th January, 1795, after directing payment of his debts, devised as follows: "As to all my freehold, copyhold, real and personal estates of which I am possessed or entitled to at the time of my decease, my copyhold estate in the manor of Kennington having been by me surrendered or intended so to be to the use of this my will, I give, devise, and bequeath the same to M. Scrafton, to have and to hold the same real and personal estates, &c., to the said M. S., his heirs, &c., upon the several uses, trusts, &c., hereinafter mentioned, viz., I give all my personal estate,

[1] In *Doe* d. *Lancashire* v. *Lancashire*, 5 T. R. 49 (1792), the doctrine was extended to the case of a posthumous child.

"We all know now, that a will is revoked by a subsequent marriage and the birth of a child. I believe, they do go the length of permitting evidence to be received against that. I do not like that; and Lord Kenyon in the last case, *Lancashire* v. *Lancashire*, 5 Term Rep. B. R. 49, did not form his opinion upon it. The circumstances themselves should be held to be an ademption, independent of any particular knowledge the testator might have. I think that the very circumstance of a wife and child infers a presumption, that the will shall not stand. This has been followed in courts of law, and in the famous case of *Christopher* v. *Christopher* (in the Court of Exchequer, July 6th, 1771. See Dougl. 35; 4 Burr. 2171, 2182); in which there was a difference of opinion upon the bench; and a very learned judgment was given by Baron Perrot against the opinion of the other barons. Only for that majority I should have held with Baron Perrot; for the decision was very strong upon the Statute of Frauds. But such a case as this has never yet been decided: the birth of children by the first wife after the execution of the will, and after the death of the wife a subsequent marriage and no children by that. I do not say, it will have the same effect. I am not the judge to decide that. But there is not a single argument applying to the feelings of mankind to draw a decision from the court, that will not apply to the one case as much as the other. Conviction flashes on every man's mind, that there is just as much presumption. Why are these subsequent children less dear to him, because he happened to have other children born before? I think, the same argument would do under the circumstances." — *Per* Sir Richard Pepper Arden, in *Gibbons* v. *Caunt*, 4 Ves. 840, 848 (1799).

whatsoever and wheresoever, &c., to my dearly beloved Mary Ann Simpson, one of the daughters of J. Simpson, &c., for her sole use and benefit forever; and I will, that out of the rents, &c., of my said freehold and copyhold estates, or by mortgage, &c., my said trustee M. S. shall pay unto the said M. A. Simpson an annuity of £150 for her life: *and in case I shall have any child or children by her*, who shall be living at my decease, then I order that my said trustee, out of the rents and profits of my said freehold and copyhold estates, or by mortgage, &c., do pay for the maintenance and education of each such child, £60 until their respective age or ages of twenty-one years; and on that event happening, I order my said trustee to levy and raise £3,000 and pay the same unto and amongst my said children by M. A. Simpson, share and share alike; and if but one such child, the whole of the said £3,000 to be paid to such surviving or only child, his executors, &c. And as to all and singular my said freehold and copyhold estates, &c. (subject to the annuities and payments aforesaid, and also subject to the legacy of £100 hereinafter mentioned), I give, devise, and bequeath the same to the use of my father J. B. Pierson, my half-brother by blood V. Pierson, my half-brother by blood A. Pierson, and my half-sister by blood W. Pierson, their several and respective heirs, &c., in equal shares, to have and to hold the same to them and their heirs, &c., forever, as tenants in common, and not as joint tenants. I give and bequeath to my said trustee and executor M. S. the said £100, &c." (Then follows a power to him to retain for his charges in executing the trusts, &c., of the will.) "And as to all the rest and residue of my real and personal estates not before specifically devised, I give, devise, and bequeath the same to the said M. S., his heirs, &c., upon the several trusts, &c., and for the several uses, &c., and charged as before mentioned;" and then he constituted the said M. S. sole executor, &c.

The testator, on the 29th of August, 1795, intermarried with the said Mary Ann Simpson in the will mentioned (now Jennings, one of the defendants). After their marriage, he had three children by her, viz., the defendants, M. Pierson, W. Pierson, and A. M. Pierson, who was born six months after the testator's death, and since deceased. At the time of making his will, the testator had one male child living, by M. A. Simpson, who died on the 9th of June, 1795, before the marriage. On the 19th of July, 1798, the testator died without altering or expressly revoking his will, leaving the defendant M. A. Pierson, his widow, now Jennings, and the defendants, M. Pierson and W. Pierson, his two children him surviving; and which children, together with their deceased sister, A. M. Pierson, upon her birth, became and were coheiresses at law, and also the customary heir of the said testator, as to the copyhold estate of the said testator, in the manor of Kennington, in the will mentioned, and which was duly surrendered to the uses of the will. About five months before the testator's death, in conversation with his wife, in the presence and hearing of Joseph Simpson, her father,

upon her requesting him to alter her maiden name, as it then stood in his will, to her married name of Pierson, the testator said *it was not of any consequence; for that he had consulted a professional gentleman, who told him that the will, as it then stood, was a good and sufficient will; and observed, he had thereby amply provided for her and her children:* and a short time before his death, in another conversation, in the presence and hearing of Edward Young, relative to the testator's late solicitor's bill of costs, wherein was charged five guineas for making his will, he, the testator, observed, *that he thought it a very exorbitant charge; for that he himself copied the will.* The will and duplicate thereof are in the testator's own handwriting. The testator, at the time of his death, was indebted to divers persons, as well by simple contract as otherwise, to a very considerable amount; and which debts are yet due and unpaid. The testator died seised of no freehold estate; but was, at the time of making his said will, and also at his decease, seised as of fee at the will of the lord, according to the custom of the manor of Kennington, of the copyhold estate in the will mentioned, holden of the manor, of a considerable annual value. The testator's personal property being small, and very insufficient for the payment of his debts, which were of great amount, the plaintiff, a creditor, filed his bill in the Court of Chancery, on behalf of himself and the other creditors of the testator, against M. S. the executor, and the other parties claiming interest in the real and copyhold estate, devised by the will under the disposition thereby for the usual accounts and administration of the personal assets, towards discharge of the testator's debts, and to have the deficiency raised by sale or mortgage of the real and copyhold estates under the charge made by the will for that purpose. The case was argued in Easter Term last.

Barrow, for the plaintiff.

R. Smith, contra.

Cur. adv. vult.

Lord Ellenborough, C. J., now delivered the judgment of the court. After stating the case, and the 6th section of the Statute of Frauds (29 Car. 2, *c.* 3), which enacts that "no devise in writing of lands, &c., nor any clause thereof, shall at any time after, &c., be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, in his presence, and by his directions and consent," &c., he proceeded thus: —

The difficulty of reconciling the doctrine of implied or presumptive revocations of a will of lands, with the express provisions of that section, was originally very considerable. This point, however, namely, that such revocations are not excluded by the Statute of Frauds, has been considered as settled ever since the case of *Christopher* v. *Christopher*, in the Exchequer in 1771; by which revocation of wills (implied not only from contradictory acts inconsistent with the existence of the

will, and its operation upon the property devised, as feoffments made or recoveries suffered of the lands devised, though to the same uses as before; and bargain and sale, though without enrolment) have been sustained: but revocations have been also holden to be necessarily implied or presumed from so material a change in the circumstances of the testator as is occasioned by subsequent marriage and the birth of a child. The doctrine of implied revocations, originally borrowed from the civil law, and applied to bequests of personal estate (as in the case of *Overbury* v. *Overbury*, 2 Show. 242, and *Lugg* v. *Lugg*, 1 Lord Raym. 441, and Salk. 592) has been since denied in some degree by the Court of Common Pleas in *Driver* v. *Standring*, 2 Wils. 90, and much doubted by Lord Hardwicke in *Parsons* v. *Lanoe*, 1 Ves. 191, in its application to devises of *land*. That it is however applicable to devises of land has been so solemnly settled upon argument in the case already mentioned of *Christopher* v. *Christopher* in the Exchequer in 1771, and has been since so frequently recognized in different courts at various times; as for instance, at the Cockpit in *Spragg* v. *Stone* in 1773; in the King's Bench, in the cases of *Brady* v. *Cubit*, Dougl. 31, and of *Doe* v. *Lancashire*, 5 Term Rep. 49; and upon many other occasions, that it must now be considered as a general proposition of law, that marriage and the birth of a child, *without provision made for the objects of these relations*, of themselves operate a revocation of a will of lands. The doctrine of implied or presumptive revocations seems to stand upon a better foundation of reason as it is put by Lord Kenyon in *Doe* v. *Lancashire*, 5 Term Rep. 58, namely, as being "a tacit condition annexed to the will" when made, that it should not take effect if there should be a total change in the situation of the testator's family, than on the ground of any presumed alteration of intention; which alteration of intention should seem in legal reasoning not very material, unless it be considered as sufficient to found a presumption in fact, that an actual revocation has followed thereupon. But upon whatever grounds this rule of revocation may be supposed to stand, it is on all hands allowed to apply (and upon this subject particularly, after what was said by Lord Mansfield in *Brady* v. *Cubit*, Dougl. 39) only in cases where the wife and children, the new objects of duty, are wholly unprovided for, and where there is an entire disposition of the whole estate to their exclusion and prejudice. This, however, cannot be said to be the case where the same persons, who after the making of the will stand in the legal relation of wife and children, were before specifically contemplated and provided for by the testator, though under a different character and denomination. There is not, therefore, in this case, that total change in the situation of the family, and that total destitution of provision for those who ought to be the objects of the testator's care and protection (although the provision be made for them under a different character) which can vacate the will on the ground of a supposed tacit condition, that it should be void upon *a total change* in the situation of the testator's family, and *a total want*

of provision for the family so newly circumstanced; or upon the ground of a presumed intention to revoke, according to any rules of law hitherto recognized on this subject. Indeed, it is not very easy to comprehend the legal effect of *an intention to revoke*, unless manifested and carried into execution by some act *in pais*. It is certainly true, that the law is not as favorable to bastards, not *in esse*, as it is to legitimate children. In a variety of cases it will not raise an use in their favor, in consideration of blood, upon a covenant to stand seised to uses: nor will the want of a surrender of copyhold to the use of a will be supplied in favor of a natural child: nor can such child properly take by the description of issue. And in other cases also, from uncertainty in the terms of description of and reference to its *parents*, a bastard is prevented from taking at all. As however in this case the children were, at the time when the will speaks, viz., at the death of the testator, born and legitimate, no question of defective description arising out of the words, "*in case I shall have any child or children by her*," can be made; nor was the policy of the law, respecting marriage, eventually contravened in this case (upon which point, the case in Cro. Eliz. 510, proceeds); inasmuch as the children who now claim under the will were not unborn bastards, but born and legitimate at the death of the testator. After what has been said already, and that the will in question is not under these circumstances vacated, on the ground of any tacit condition annexed to the will at the time of its making, nor on the ground of any intention to revoke, to be presumed in favor of a wife and child or children unprovided for (the fact upon which such presumption could be formed not existing in the present case) it becomes unnecessary to consider whether the revocation generally holden to arise from subsequent marriage and the birth of a child, without provision made for the objects of these relations, can be *rebutted by parol declarations* in favor of the will. It is enough to say that if a revocation, which would otherwise be implied, can be so rebutted, it is rebutted in the present instance: for it is stated that about five months before the testator's death, in a conversation with his wife in the presence and hearing of Joseph Simpson, her father, upon her requesting him (the testator) to alter her maiden name, as it then stood in his will, to her then married name of Pierson, he said, *that it was not of any consequence; for that he had consulted a professional gentleman, who had told him that the will as it then stood, was a good and sufficient will; and observed, that he had thereby amply provided for her and her children.* Upon the whole, therefore, if there be any question which at this time of day can be agitated with effect, whether implied revocations of wills of land can be allowed at all consistently with the Statute of Frauds, our decision leaves even that question untouched; inasmuch as we sustain the will as yet in force, and unrevoked by any implication whatsoever. Neither does our decision clash with the doctrine of a tacit condition annexed to the will, viz., that it should be void in the event of a marriage and children *without provision;* inasmuch as that

condition, viz., of marriage and of the birth of children unprovided for, has not taken effect in this instance. And the question, How far implied revocations are competent to be rebutted by the parol declarations of the testator? is also left untouched, for the reason before given. Therefore, without impugning any one decision upon the subject, and in conformity with them all, upon whatever various grounds they may have proceeded, we feel ourselves warranted in considering this will, made in favor of those who at the time of the testator's death had become his wife and children, as in full force, and not revoked under the circumstances stated in this case.

Decree to the plaintiff.[1]

EMERSON *v.* BOVILLE.

PREROGATIVE COURT OF CANTERBURY. 1802.

[*Reported* 1 *Phillim.* 342.]

SIR WILLIAM WYNNE. I take it to be established by an uniform course of decisions for above a century, that marriage, and the birth of a child by that marriage, creates a presumptive or implied revocation of a will; — but it is only a presumption grounded on the supposition that so complete a change having happened in the family of the deceased, raises the implication that he did not intend that his will should take effect. It may be rebutted, as was the case of *Thompson* formerly *Myall* v. *Sheppard and Duffield* (1782); there a seaman made his will in favor of his children by a former wife; — he married again, and had

[1] "The case of *Kenebel* v. *Scrafton* had for a considerable time very great weight with me upon this question. The point immediately before the court was, whether the will of that testator, who was an unmarried man, was revoked by his marriage and the subsequent birth of children. The opinion of the court, consistently with former authorities, was that as marriage alone will not revoke a will, though connected with the birth of a child it will, yet those two circumstances would not have that effect; the will containing a provision for children, if the testator should have any.

"Upon what can be collected from what was said by the court and from the argument, there was nothing upon the face of that will, raising a necessary implication, that legitimate children were not to take; or that legitimate and illegitimate children could not take together, as it has been argued here, under the same description. It would be very difficult to make out, that they can so take: but that was not a difficulty, with which the court had to contend in that case. If the court had thought, that those words meant illegitimate children, the necessary effect of the subsequent birth of children would have been, that the will would have been revoked. We may conjecture, that he meant illegitimate children, if he did not marry: yet notwithstanding that may be conjectured, the opinion of the court was, as mine is, that where an unmarried man, describing an unmarried woman as dearly beloved by him, does no more than making a provision for her and her children, he must be considered as intending legitimate children; as there is not enough upon the will itself to show, that he meant illegitimate children; and my opinion is, that such intention must appear by necessary implication upon the will itself." — *Per* LORD ELDON, C., in *Wilkinson* v. *Adam*, 1 Ves. & B. 422, 465 (1813).

one child, and a posthumous child. Many declarations proved that he did not believe the child, which was born in his lifetime, to have been begotten by him; and there were letters and declarations by which it was completely established that it was his intention that the will should not be revoked; and Dr. Calvert pronounced for the will.

But is there any instance in which there being nothing of this kind, without declarations, or circumstances, importing a permanence of intention, that the presumption has been held to be taken away merely by the death of the child? I think there is no such case, and the effect would be severe, were it to be so held.

For it being established law, that marriage and the birth of a child revokes; — here the wife has no provision.

Finding no case in which it has been held that the death of the child revives the will, I should have been unwilling to hold a doctrine so severe on the second wife, if this had been a new case; — but I find a case in point, that of *Sullivan* v. *Sullivan the attorney of Brooke.* Joseph Derwell made his will March 1771, giving an annuity of £100 to his brother; — several legacies, and the residue to three children, two by his first wife, — and one by his second; — he was then a widower; the will was all in his own handwriting; — on the 8th of August, 1771, he married; — on the 1st of May, 1772, a child was born; on the 11th of the same month the child died; on the 20th of September, 1772, the testator died, leaving property to the value of £10,000; — probate of the will was prayed, which was opposed, and an administration was prayed to his effects as having died intestate; — two points were made: —

1st, That the will was for the benefit of the former children; and it was argued that in none of the cases decided, was the will in favor of children.

2dly, That the death of the child during the life of the testator, revived the will.

On these points, Sir George Hay said,

1st. That it was as much his duty to provide for a child by his subsequent marriage, as for his other children.

2dly, That he considered that the will would not revive, unless it were republished, or revived by some act. And administration was decreed.

On the authority of that case, and on principle, as I take it, — the death of the child does not revive the will; — but it requires some act, some recognition, or something to show the deceased's intention that it should take effect.

I think the will was revoked, and that it remains revoked.[1]

[1] Cf. *Wright* v. *Sarmuda*, 2 Phillim. 266, *note* (1793).

EX PARTE ILCHESTER.

CHANCERY. 1803.

[*Reported* 7 *Ves.* 348.]

THE late Earl of Ilchester[1] in 1778, being married but not then having children, made his will, by which he appointed his wife guardian of all her daughters, and his wife and brother guardians of all her sons. Lady Ilchester died in 1790, leaving a son and several daughters. In 1794 Lord Ilchester married Maria Digby, and, by virtue of a power which he had over certain property settled by him on his first marriage, he appointed £500 a year in favor of his second wife. There was a provision in the settlement for the children of this marriage. There were two sons of the second marriage. Lord Ilchester died in 1802.

On a petition for the appointment of guardians for the testator's children, one of the questions was whether the will of 1778 was revoked by the subsequent marriage and birth of issue.

Mr. Romilly and *Mr. Newbolt*, in support of the petition.

Mr. Richards and *Mr. Fonblanque*, against the petition.

LORD ELDON, C., asked the assistance of SIR WILLIAM GRANT, Master of the Rolls, and LORD ALVANLEY, Chief Justice of the Court of Common Pleas.

THE LORD CHANCELLOR [ELDON]. If the points upon this petition had been confined to that, which arises upon the second marriage and the birth of children by that marriage, under the circumstances, in which that marriage and the birth of those children took place in this particular case, notwithstanding that question must have been determined, not merely with respect to this matter of guardianship, but must have had relation to, and effect upon, the property of this family, which I take to be considerable, I should not have been justified in giving the Master of the Rolls and the Lord Chief Justice the trouble of attending upon that point; for I had no considerable doubt at first, nor has that been increased since, that the second marriage and the birth of children by that marriage should not under all the circumstances be taken to be a revocation. My opinion is, it ought not to be so considered. I am happy to find, the Master of the Rolls and the Lord Chief Justice concur with me upon that; and, without stating any opinion upon the cases that have been cited, I may state the sentiments of us all to be, that, where a testator stands in the circumstances, which appear in this case, with regard to the children of the prior marriage, and the circumstances, in which he placed himself, as to the children of the second marriage, this case forms a case of exception. I do not go farther; for it is too obvious from what has since passed, that from the rule,

[1] The following statement is substituted for that in the report, and only so much of the case as relates to revocation by marriage and the birth of issue is given.

originally adopted and now settled, whether to be considered a rule of law or a presumption, whether going upon the intention or an implied condition, those difficulties have arisen, which some judicial persons, one in particular, foresaw. I think it better therefore to confine the opinion in these terms; that under all the circumstances of this case, this appointment is not revoked by the subsequent marriage and birth of children.

DOE d. WHITE *v.* BARFORD.

King's Bench. 1815.

[*Reported* 4 *M.* & *S.* 10.]

At the trial of this ejectment, before *Heath*, J., at the last Cambridgeshire Assizes, the case was this: —

The plaintiff claimed under the will of one J. Bonteel, who, being seised in fee in 1791, married, and in 1792 made his will, and devised the premises in question to his niece, from whom the plaintiff derived title. J. B. died leaving his wife enseint, which was unknown to either of them at the time of his death, and afterwards the wife was delivered of a daughter, from whom, as heir at law, the defendants derived title. And the question was, Whether this alteration of circumstances was an implied revocation of the will. The learned judge ruled that it was not, and there was a verdict for the plaintiff.

Blosset, Serjeant, moved for a nonsuit.

Lord Ellenborough, C. J. The argument seems to be, that because the testator, had he known his situation, ought to have revoked his will, therefore the law will impliedly revoke it. But if it is to be understood that every will is made upon a tacit condition that it shall stand revoked whenever the testator by the circumstance of the birth of a child becomes morally bound to provide for it, I do not see why the birth of any one of a numerous succession of children would not equally work a revocation. But where are we to stop? Is the rule to vary with every change which constitutes a new situation giving rise to new moral duties on the part of the parent? Marriage, indeed, and the having of children, where both those circumstances have concurred, has been deemed a presumptive revocation, but it has not been shown that either of them singly is sufficient. I remember a case some years ago of a sailor who made his will in favor of a woman with whom he cohabited, and afterwards went to the West Indies and married a woman of considerable substance; and it was held, notwithstanding the hardship of the case, that the will swept away from the widow every shilling of the property; for the birth of a child must necessarily concur in order to constitute an implied revocation. In *Doe* v. *Lancashire*, 5 T. R. 49, it was adjudged that marriage and the pregnancy of the wife with the knowledge of the husband, and the subsequent birth of a posthumous child,

came within the rule, the same as if the child had been born during the parent's life. In this case it is desired of us to extend the rule a step farther, but I own I am afraid of so doing.

Le Blanc, J. Lord Kenyon considered the rule as founded upon a tacit condition annexed to the will, that if the party should marry and have a child it should not take effect.

Rule refused.

MARSTON *v.* ROE d. FOX.

Exchequer Chamber. 1838.

[*Reported* 8 *A. & E.* 14.]

This case was brought by three writs of error from the Court of Queen's Bench, where judgment had been given for the lessor of the plaintiff on a special verdict. The plaintiff below brought ejectment to recover certain lands in Staffordshire, the trial of which action was removed, by a suggestion on the record, to Gloucester, where it took place before *Alderson*, B., at the Spring Assizes, 1836. Upon the trial, cross bills of exceptions were tendered to, and allowed by, the learned judge, — that on the part of the lessor of the plaintiff containing exceptions, as well against admissions of evidence given by the defendant below, as also for the rejection of evidence which he had offered; that on the part of the defendant below for the rejection of evidence only. One of the writs of error was sued out by the defendant below to bring up the judgment which was given for the plaintiff, without argument, on the special verdict; and each party brought up his own bill of exceptions by a writ of error sued out by himself.

The jury found for the plaintiff as to the premises stated in the declaration to have been demised by William Halton. And, as to the residue of the premises, alleged to have been demised by W. J. Fox, they found a special verdict. The verdict stated, —

That on January 17th, 1835, John Fox made his last will, duly executed, &c., and thereby devised as follows: "I give and devise," &c. (specifying certain messuages and lands), "unto and to the use of my friend, Anne Bakewell, of Uttoxeter aforesaid, spinster, and her assigns, for and during the term of her natural life, or so long thereof as she shall remain sole and unmarried, subject, nevertheless, to impeachment of waste; and, from and after the decease or marriage of the said Anne Bakewell, which shall first happen, I give and devise the said messuages, dwelling-houses or tenements, buildings, yards, gardens, farms, lands and hereditaments, with the appurtenances, to my relation, William Marston, of Manchester, in the county palatine of Lancaster, cork merchant, his heirs and assigns forever. And" (after some further devises, not material here, to relations and others)

"I give, devise and bequeath all my messuages, farms, lands, tenements, tithes, rents, hereditaments and real estate, and parts and shares of such (not hereinbefore given, devised, and disposed of), wheresoever situate in Great Britain, and whether freehold, copyhold or customary, and whether in possession, reversion, remainder, contingency or expectancy, with all rights, members and appurtenances thereto respectively belonging; and also all my moneys, securities for money, goods, cattle, chattels, rights, credits, effects and personal estate whatsoever and wheresoever, and of what nature, kind or quality soever, unto the said William Marston, his heirs, executors, administrators and assigns forever, according to the respective natures and tenures thereof; nevertheless subject" to debts, etc.

That from March 25th, 1834, down to the time when he executed the said will, the testator contemplated a marriage with the said Anne Bakewell. That he married her on February 21st, 1835, and lived with her until the time of his death. That from the time of his marriage until his death he was in a bad state of health; and that on May 11th, 1835, he was taken ill, and died in about two hours. And that at the time of his death he was seised in fee-simple in possession of the residue of the hereditaments and premises mentioned in the will, and demised by the said William John Fox.

That the said will was, in a short time after the death of the said John Fox, found in his bed-room in an oak chest of which he had kept the key; and that Elizabeth Stone, the person who had found the will, had been told by the testator, ten weeks before his death, where he had deposited his will.

That, on the 16th October, 1835, the said wife of John Fox was delivered of the said William John Fox, one of the lessors of the plaintiff, who is the only son and heir at law of the said John Fox.

That the said John Fox was seised in fee of certain lands, tenements, and hereditaments, and continued so seised until the time of his death, out of which lands, tenements, and hereditaments his widow would be entitled to dower, unless she was deprived thereof by the operation of his will, or by operation of law.

That the testator, on 20th November, 1834, had agreed to purchase a house for £690, for the purpose of residing in it when married. That in the draft of conveyance sent to the testator for his perusal was inserted a declaration that "any wife testator might take should not be entitled to dower." That testator requested that such clause should be struck out; and that, upon its being explained to him as he was on the point of marriage, that, if, after he was married, he wished to resell the property, he could not do so without the consent of his wife, he said he was perfectly aware of that, and that he did not intend to debar his wife of dower.

That, on the 30th September, 1829, Joseph Fox, the brother of the said John Fox, entered into a written contract for the purchase of some property at Marston Montgomery, in the county of Derby, at the sum

of £463 14*s.* 6*d.*, with Thomas Harrison and others, trustees under the will of John Etches, deceased. That, on 25th March following, the said John Fox was let into possession of the last-mentioned premises; but, the titles not being then complete, it was agreed that he should receive the rents and profits from that period, and should pay interest to the said trustees on the purchase-money, until the purchase was completed.

That, after this agreement, the said John Fox, in like manner as the purchasers of other parts of the same estate, which was sold in lots, was let into possession of the property so contracted for by the said Joseph Fox, and let the same to John Deaville, who held the same as tenant, and paid rent half-yearly to John Fox, from the said 25th of March, 1830, until the time of his decease, some of which payments were made in the presence of his brother Joseph. That no other contract than the one before mentioned to have been entered into, by the said Joseph Fox with the said Thomas Harrison and others, was made for the sale of the said last-mentioned property.

That, on 17th November, 1834, the said Joseph Fox died unmarried and intestate, seised of considerable real estates in fee simple in possession, which thereupon descended to the said John Fox, as his only brother and heir at law; and that John Fox was the sole next of kin of Joseph Fox, and entitled to administration of the personal estate of which he died possessed.

That by lease and release, bearing date 6th and 7th March, 1835, the said property at Marston Montgomery was conveyed by the surviving trustees under John Etches's will to the said John Fox, in consideration of £463 14*s.* 6*d.*, and he thereupon paid the said purchase-money, and interest thereupon from 25th March, 1830.

That, in August, 1835, the said John Deaville paid half a year's rent, due for the same premises on the 25th March preceding, to John Hordern, who was one of the executors of the said John Fox.

That the value of the real estate left by the said John Fox amounts to about £49,000.

Error was assigned upon the judgment in the common form; and the plaintiff below joined in error.

The plaintiff below (the defendant in error), in his bill of exceptions, stated that the defendant below, on the trial, admitted the title of W. J. Fox as heir at law, and consented to a verdict for the plaintiff below as to the premises stated to have been demised by W. Halton; but that, as to the residue of the premises, he insisted on his own title as devisee under the will of John Fox, dated January 17th, 1835. The plaintiff below then stated the following grounds of exception.

First, that the defendant below (before putting in the will of January, 1835), offered in evidence a will of John Fox, dated March 25th, 1834, in which he bequeathed to William Marston (the defendant below) and another, for the life of Anne Bakewell, an annuity of £40, upon trust to pay the same to her, and not to any husband or assignee, &c.; and he

made the annuity payable out of the rents of certain lands, which he bequeathed to the trustees for the term of ninety-nine years (if Anne Bakewell should so long live) for that purpose; and, subject to the above bequests, he devised all his estates, lands, &c., and personalty, to his brother, Joseph Fox, his heirs, executors, &c., forever. That the defendant below likewise offered in evidence a will of John Fox, dated December 1st, 1834, whereby he devised certain messuages and lands to Anne Bakewell for her life, and from and after her decease to the said William Marston in fee; he also bequeathed certain legacies; and, subject, &c., he left all the residue of his real and personal estates to W. Marston, the defendant below, his heirs, executors, &c., forever; and he appointed W. Marston and another his executors. That the counsel for the plaintiff below objected to the admission of these wills of 1834, but that the learned judge received them, whereupon the plaintiff's counsel excepted, &c.

The second ground of exception was the admission in evidence of John Fox's declaration, under the circumstances stated in the special verdict, that he did not intend to debar his wife of dower. The bill of exceptions stated this evidence to have been objected to at the trial, on behalf of the plaintiff below, but received; whereupon, &c.

Thirdly, the bill of exceptions stated that the plaintiff below, at the trial, proved the contract entered into by Joseph Fox with Harrison and others, for the purchase of property at Marston Montgomery, as stated in the special verdict; and it set out the contract as follows: "Joseph Fox, of Uttoxeter, in the county of Stafford, tanner, doth hereby acknowledge himself to be the highest bidder for the purchase of the premises described in the annexed particulars, in lots 2 and 3, under the above conditions, at the price or sum of," &c.; "and he hereby agrees to pay the said purchase-moneys pursuant to these conditions, and in all other respects to be bound by and perform the same; and the vendors" (naming them) "do hereby agree to sell the said tenements and premises mentioned in this contract, to the said Joseph Fox, under the above conditions, at the prices aforesaid. Dated the 30th day of September, 1829. Joseph Fox, Benjamin Carnell, Thomas Carnell." Then followed a specification of the lots. The bill then stated, as in the special verdict, the facts proved, from the letting of John Fox into possession to the payment of rent by Deaville. It then proceeded: "And the counsel for the said Richard Roe, further to prove the said issue on his part, and for the purpose of showing that it was the said John Fox who entered into the said contract for the purchase of the said premises at Marston Montgomery, and that the said Joseph Fox was the agent for the said John Fox in that behalf, and had signed the contract as such agent, then and there tendered and proposed to give parol evidence that, on the 30th day of September, 1829, the said Joseph Fox (the brother of the said John Fox) was appointed by the said John Fox his agent, for the purpose of making the agreement aforesaid for the purchase of the said prem-

ises; and that, in consequence of such appointment, the said Joseph Fox did, in his own name, but as such agent as aforesaid and on behalf of the said John Fox, sign the said agreement; and that both the said Joseph Fox and John Fox, in the year 1830, within three months after the said agreement was so signed as aforesaid by the said Joseph Fox, gave instructions to one James Blair, the attorney who prepared the deed of conveyance of the same hereditaments and premises, that the same should be conveyed to the said John Fox, and not to the said Joseph Fox; and that the same were so conveyed accordingly." And the bill of exceptions stated that this evidence was objected to by the counsel for the defendant below, and that the learned judge rejected it; whereupon, &c.

The plaintiff below assigned for error that the evidence objected to by him "ought not," and that the evidence tendered by him as above mentioned "ought to have been admitted and allowed." The defendant below joined in error.

The defendant below, in his bill of exceptions, stated that it was admitted, on the trial, that the testator contemplated marriage when he made his will of January 17th, 1835. That the counsel for the defendant below offered in evidence certain letters of the testator to him, which were set out, written subsequently to the will, and expressing much kindness to the defendant. Also a letter written to the defendant, after the marriage, announcing it, but stating that no act of the testator's should ever prejudice the interest of relatives, and subscribed, "Your truly sincere and affectionate cousin, JOHN FOX." Also a verbal declaration of the testator, a week or ten days before his death, that he had made his will and that he would not alter it, as it was, so it should stand; that he had left the chief part of his property to his friend, Mr. William Marston; and that he had taken care the Bakewells should not have any part of his property; and other expressions to a similar effect between the marriage and death of the testator. Also a statement by him, about a month before his marriage, that he was going to be married to Anne Bakewell; that he had made his will; that he had left her a very handsome fortune, whether he married her or not; and that he had left Mr. Marston the biggest bulk of his property, by the wish of his brother: and other declarations, both before and after the marriage, importing that his property would fall into the hands of Marston, the defendant below.

The bill of exceptions then stated that the counsel for the plaintiff below objected to the reception of these letters and declarations, and the learned judge excluded them; whereupon, &c.

The defendant below assigned for error that the evidence "ought to have been admitted and allowed, to entitle the said defendant to a verdict." Joinder.

An action of trover for the title-deeds of the same estate had been brought by the lessor of the plaintiff against the defendant below in the Court of Exchequer, and came on for trial before *Alderson*, B., at the

same assizes; and, as the same question arose in both actions, a course precisely similar was pursued in both; and, for the purpose of avoiding as well unnecessary expense to the parties as loss of time to the respective courts of error, it was thought convenient that the argument of the writs of error in the first-mentioned cause should take place in the presence of all the judges of the three courts of Westminster Hall, the parties having consented that both cases should abide the decision of the present.

This case was argued June 13th and November 1st and 27th, 1837, before TINDAL, C. J., LORD ABINGER, C. B., LITTLEDALE, PATTESON, WILLIAMS, COLERIDGE, PARK, BOSANQUET, VAUGHAN, and COLTMAN, JJ., and PARKE, BOLLAND, ALDERSON, and GURNEY, BB.

Sir J. Campbell, Attorney-General, for the plaintiff in error (the defendant below).

Sir W. W. Follett for the defendant in error (the plaintiff below).

Cur. adv. vult.

TINDAL, C. J., in this term (January 26th) delivered the judgment of the court. After stating the manner in which the writs of error came before the court, his Lordship proceeded. This case has accordingly been argued in the presence of all the judges of England, with the exception of Lord Denman.

On the part of the plaintiff in error (the defendant below), it was contended that, admitting the general rule to be established, that marriage and the birth of a child operated as the revocation of a will made before the marriage, where the wife and child were left without provision, yet such revocation was grounded on an implied intention of the testator to revoke his will under the new state of circumstances which had taken place since the will made, and upon such implied intention only, and consequently that any evidence was admissible on the part of the devisee which showed a contrary intention, in order to rebut such presumption.

On the part of the defendant in error it was contended that such revocation, under the circumstances above supposed, is the consequence of a rule of law, or of a condition tacitly annexed by law to the execution of a will, that, when the state of circumstances under which the will is made becomes so materially, or rather entirely, altered by a subsequent marriage and the birth of a child, the will should become void; and that the operation of this rule of law was altogether independent of any intention on the part of the testator. The broad question, therefore, which has been argued between the parties has been, whether evidence of the testator's intention that his will should not be revoked is admissible to rebut the presumption of law that such revocation should take place? And we all concur in the opinion that the revocation of the will takes place in consequence of a rule or principle of law, independently altogether of any question of intention of the party himself, and consequently that no such evidence is admis-

sible. The plaintiff in error, in support of the proposition for which he contends, has relied on the authority of various decisions of cases, as well in the ecclesiastical courts as in the courts of common law. With respect to the former we cannot but entertain considerable doubt whether their authority can be held to apply to the present question. For, whilst we are entirely convinced of the importance of an uniformity of decision between the courts of ecclesiastical and of common law jurisdiction, where the same state of facts is under investigation, or the same principle of law is under discussion in each; and entertaining, as we do, at the same time, the highest respect for the learning and ability of those by whom justice is administered in the ecclesiastical courts, we cannot forget that in the question now before us *we* have to deal with the provisions of a Statute with which the questions ordinarily coming before *them* are wholly unincumbered. The question now before us relates to the revocation or non-revocation of a will *devising real property;* it is a question whether such revocation shall be allowed to depend upon evidence of intention, that is, upon evidence of which parol declarations of the testator may confessedly form a part; whilst the Statute of Frauds has anxiously and carefully excluded evidence of that nature, with respect both to the original making and the revoking of wills of land. The ecclesiastical courts, on the other hand, are concerned in the granting probate of wills and testamentary papers, *relating to personalty only*, in which cases no statutory enactment has excluded parol evidence of the intention of the testator as to what shall or shall not be a testamentary paper, or what shall or shall not amount to a revocation or republication of a will. On the contrary, the evidence bearing on those points is generally mixed up with declarations of the party, and frequently consists of such declarations alone. The decisions, therefore, in the ecclesiastical courts, referred to by the counsel for the plaintiff in error, may be sound decisions with respect to the subject-matter to which they relate, and may yet furnish no authority on the case now in judgment before us. And, if that question is to be decided, as we think it is, by the weight of the authorities to be found in the courts of common law, the balance preponderates greatly in favor of the proposition that no evidence of intention is to be admitted to rebut the presumption of law that a will is revoked by subsequent marriage and the birth of a child. The cases relied upon principally by the plaintiff in error (the defendant below) are those of *Brady, lessee of Norris*, v. *Cubitt*, 1 Doug. 31, and *Kenebel* v. *Scrafton*, 2 East, 530; those which are appealed to by the defendant in error (the lessor of the plaintiff) are *Doe dem. Lancashire* v. *Lancashire*, 5 T. R. 49, and *Goodtitle dem. Holford* v. *Otway*, 2 H. Bl. 516. Now, with respect to the case of *Brady, lessee of Norris*, v. *Cubitt*, it must be admitted that the opinion of Lord Mansfield is expressed in terms the most explicit and unreserved, that the presumption of revocation from marriage and the birth of children, like all other presumptions, "may be rebutted by every sort of evidence."

But it must, at the same time, be observed that the decision of that case rests also upon other grounds, which are altogether satisfactory and free from objection; viz., first, that the disposition made by the will was of *part only*, not *the whole* of the estate; and, secondly, that the instrument executed after the birth of the child operated *as a republication* of the devise contained in the will. And, as to the case of *Kenebel* v. *Scrafton*, it affords no authority whatever for the position that such implied revocation can be rebutted by parol evidence of a contrary intention existing in the testator's mind, because, in that case, the objects of the marriage were contemplated and provided for by the will, so that there was no implied revocation whatever of the will; and, next, because the question as to the admissibility of such evidence is expressly declared by Lord Ellenborough, in giving the judgment of the court, to be left entirely untouched by the decision of that case.

And, looking, on the other hand, at the cases relied upon on the part of the lessor of the plaintiff, we agree entirely with Lord Kenyon as to the ground upon which the doctrine of implied revocation, under the circumstances now before us, ought to be rested. That very learned judge, in giving his judgment in the case of *Doe dem. Lancashire* v. *Lancashire*, 5 T. R. 58, 59, treats it as a principle of law, of which he suggests the foundation to be a tacit condition annexed to the will itself when made, that it should not take effect if there should be a total change in the situation of the testator's family; and this foundation of the rule is confirmed by the judgment of Lord Ellenborough in the case above referred to (2 East, 541), where he says this ground is to be preferred to "any presumed alteration of intention; which alteration of intention should seem in legal reasoning not very material, unless it be considered as sufficient to found a presumption in fact, that an actual revocation has followed thereupon." The case, again, of *Goodtitle dem. Holford* v. *Otway*, although not the same in circumstances, yet establishes the very same principle as that contended for by the defendant in error. That case did not indeed relate to the revocation of a will by subsequent marriage and the birth of a child, but to revocation of a will by a subsequent conveyance of lease and release executed for a limited purpose only. But the same principle was laid down, that parol evidence shall not be admitted to show that the testator meant his will to remain in force against the revocation implied by law from the execution of such subsequent conveyance, the Lord Chief Justice Eyre stating his opinion to be, "that, in cases of revocation by operation of law," "the law pronounces upon the ground of a *presumptio juris et de jure*, that the party did intend to revoke, and that *presumptio juris* is so violent, that it does not admit of circumstances to be set up in evidence to repel it. And this makes it difficult," he says, "to understand the case in Douglas (*Brady, lessee of Norris.* v. *Cubitt*), supposing that to be a case of revocation by operation of law, and not within the Statute of Frauds."

And we think this opinion, at which we have arrived, not only supported by the authority of the decided cases, but the only one which is consistent with the provisions of the Statute of Frauds. For, if, against the intention to revoke, which is presumed by law, parol evidence of a contrary intention could be admitted, such as evidence of conduct of the testator leading to the inference that he meant the will to stand, or of declarations to that effect, then it would be but reasonable to allow such evidence to be met and encountered by evidence of conduct of the testator leading to a different inference, and of declarations contradictory to the former. And, again, the admission of such evidence leads to this further difficulty, that, if the testator changes his first intention, and adopts a contrary one, which of the two intentions is to prevail? Is it to be the first, which is clearly expressed and proved, or is the latest formed intention, like the last will, to be allowed to predominate? It was precisely to preserve us from the perplexity and uncertainty of such conflicting evidence, both in the making and revoking of wills, that some of the provisions of the Statute of Frauds were expressly framed. We think, therefore, such evidence was inadmissible; and that the rejection of it, when offered by the plaintiff in error (the defendant below), was right; and that the bill of exceptions, tendered upon that ground by the defendant below, and allowed by the learned judge, has entirely failed.

But the plaintiff in error contends that the rule of law, to which we have adverted, does not apply to the case before us. It becomes necessary, therefore, to determine what is the precise rule of law upon this subject, and to consider the objections urged against its application to the present case. And, upon a careful examination of the several cases which have been decided on this point, we take the rule of law, so far as it is material to the present inquiry, to be this; that, in the case of the will of an unmarried man having no children by a former marriage, whereby he devises away the whole of his property which he has at the time of making his will, and leaves no provision for any child of the marriage, the law annexes the tacit condition that subsequent marriage and the birth of a child operates as a revocation.

Now, with respect to the rule so laid down, the plaintiff in error objects that the exception to it is not confined to the single case where a provision is made by the will for the children of the marriage, but that the case is also excepted in which a provision is made by the will for either the wife, or the children; and, still further, he contends that, if it is necessary that provision should be made for both wife *and* children, it is enough that it is made either by the will itself or any subsequent provision; and that, upon the facts of this case, it appears a provision is made for both in the one way or the other; and that the estate, which was conveyed to the testator after the making of his will, being an after-purchased estate, did not pass thereby, but descended to the child of the marriage as his heir at law, and thereby formed such a provision for him.

With respect to the first objection, we are all of opinion that, under the circumstances above supposed, in order to prevent the revocation of the will, and to take the case out of the general rule, it is not sufficient that a provision is made for the *wife only*, but that such provision must also extend to the children of the marriage.

The children of the marriage, both in the consideration of our law, and of the civil law, from which the rule itself has been adopted, are the subjects of the marked anxiety of both codes of law. This is evident from the preamble to the Statute of Wills, 32 H. 8, *c.* 1, which recites, as the object of the Statute, the enabling the king's subjects to further "the good education and bringing up of their lawful generations," and "to discharge their debts, and, after their degrees set forth, advance their children;" and, still further, the observation of Lord Chancellor Nottingham, in the case of *Pitt* v. *Pelham and Another*, Freeman's Rep. ch. 134, is direct upon the point: "The ground of the Statute of Wills, 32 H. 8, is the good of children and posterity." And no case has been decided, in which the will has been held to be not revoked, where the courts have not acted on the principle that the provision was not made for the wife only, but extended to the children also. In the case of *Eyre* v. *Eyre*, cited in 1 Peere Williams, 304, the will appears to have been held to be revoked upon the ground that no provision is made for the child. And the case of *Brown* v. *Thompson*, 1 Eq. Cas. Abr. 413, pl. 15 (s. c. 1 P. Wms. 304, note †, 6th ed.), which at first seems to lead to a contrary conclusion, does in fact support the principle now laid down. In that case, the testator had devised an estate to the woman whom he afterwards married, *and her heirs;* and Sir John Trevor, M. R., held the will to be revoked by the subsequent marriage and the birth of a child; which must necessarily have been on the ground that no provision was made for *the child;* and, although this decree was afterwards reversed by the Lord Keeper Wright, yet such reversal (the propriety of which seems very doubtful) expressly recognizes the principle that the children of the marriage must be provided for by the will; for he assigns, as the reason for the reversal, that "no injury is done any person; and those are provided for, whom the testator was most bound to provide for," meaning thereby that the child was to be considered as provided for, by reason of an estate of inheritance having been given to the mother. And the case of *Kenebel* v. *Scrafton* (before referred to) confines the exception to the case where both wife *and* children are provided for by the will.

Taking, therefore, the rule of law to be, that *the children* of the marriage must be provided for in order to prevent the revocation of the will, it is obvious that no provision whatever is made by this will for any child of the marriage; and whether any provision whatever is made for *the wife* by the devise to her of the estate for life, upon the condition expressed in the will, or whether she could claim a provision by her right to dower, we give no opinion whatever, because it is obvious that such provision for the wife, if it exists at all, is limited to her for

life only, and cannot be extended in any way to form a provision for the children of the marriage.

But it is further objected that an after-purchased estate did not pass by the will, but descended upon the son in fee, and thereby became a provision for him, and prevented the revocation of the will. In the first place we answer, that no case can be found in which after-acquired property, descending upon the child, has been allowed to have that effect. And indeed such a proposition seems incompatible with the nature of a condition annexed to the will, which, so far as relates to the existence or extent of the provision, must, in its own nature, have reference to the existing state of things at the time the will itself was made.[1] But, secondly, it appears to us a conclusive answer to the objection, that, upon the statement of facts in the special verdict, the testator had in him, at the time of making his will, an equitable interest in the estate in question, which equitable interest passed to the devisee under his will, so that the subsequent conveyance of the legal estate to the testator would give no real or beneficiary interest to his heir at law, but would make him a trustee for the devisee. For it is well established that an estate contracted for will pass under general words of devise in a will, even though the agreement to purchase is not to be carried into execution until a future day, which does not occur until after the time when the will bears date. See *Potter* v. *Potter*, 1 Ves. Sen. 437; *Greenhill* v. *Greenhill*, Pre. Chanc. 320; see also the case cited from the Rolls in 7 Ves. Jun. 436, 16 Ves. Jun. 253; *Lawes* v. *Bennett*, 1 Cox, 167. And, in this special verdict, it appears that the contract to purchase so entered into by Joseph Fox upon his dying intestate and unmarried, descended upon and came to John Fox, his elder brother and heir at law, and sole next of kin, and the person entitled to take out administration of his personal estate. John Fox, therefore, at any time after his brother's death, had the right to file a bill in equity for the specific performance of the contract, and was therefore seised of the equitable estate at the time of making his will.

Holding, therefore, as we do, that the beneficiary interest in this estate passed under the devise, we consider the descent of the legal estate upon the child of the marriage to have formed no provision for him, but that he was left wholly unprovided for, as he neither took anything under the will, nor anything (if that would have been sufficient) by descent from his father.

We therefore think the will revoked, and that the lessor of the plaintiff is entitled to have the judgment affirmed which has been already given for him on the special verdict. And this makes it unnecessary for us to give any judgment upon the bill of exceptions tendered by the lessor of the plaintiff; for, as he is entitled to our judgment on the facts found by the jury, that bill of exceptions may for the present be considered as wholly immaterial, or as if it had never been tendered

[1] And in *Baldwin* v. *Spriggs*, 65 Md. 373 (1886), it was *held*, that the descent of property on a child did not overthrow the presumption of revocation. — Ed.

at the trial; although, at the same time, we have no hesitation in declaring our opinion to be, that the learned judge was right in admitting the evidence therein mentioned, but wrong in rejecting the evidence which was offered to prove that Joseph Fox entered into the agreement of purchase, stated in the bill of exceptions, as the agent of John Fox.

Upon the whole, therefore, we are of opinion that the judgment of the Queen's Bench must be affirmed.

Judgment affirmed.[1]

ISRAELL *v.* RODON.

PRIVY COUNCIL. 1839.

[*Reported* 2 *Moore P. C.* 51.]

SIR HERBERT JENNER.[2] The question which is raised in this appeal is, whether the fact of there having been a settlement made upon the marriage of Mr. Henry Rodon, would not exclude the revocation of a will and codicil made by him prior to the marriage, the child having been provided for as well as the mother by the settlement.

Both the question and the course of the argument has turned upon the doctrines which have been held in the ecclesiastical courts, as they may be supposed to be affected in some decree by the case which has been recently decided in the Exchequer Chamber before all the judges, the case of *Marston* v. *Roe dem. Fox*, 8 Adol. & El. 14. It is undoubtedly true, that in the ecclesiastical courts it has been the rule to admit parol evidence of declarations and other circumstances, from which the court can collect what was the intention of the testator as to the continuance of his will, which he had made before such a total change of circumstances took place in his situation, and with reference to the new obligations which he had contracted by those subsequent events. And the court, therefore, in the cases which have been referred to, have gone into a minute inquiry into the particular circumstances of each particular case. The declarations of intentions have in all those cases been admitted, and according to those precedents it was, that when the case of *Fox* v. *Marston*, 1 Curteis, 494, came before the Prerogative Court, with respect to that branch of it affecting the personal property, the court, according to the precedents there laid down, held that parol evidence was admissible to rebut that which was considered to be the presumed intention on the part of the testator, under the total change of circumstances, and that the will made before the occurrence

[1] In *Yerby* v. *Yerby*, 3 Call, 334 (1803), and *Wheeler* v. *Wheeler*, 1 R. I. 364 (1850), a widower, with children, married again and had children by the second marriage; and in each case it was *held* that the presumption of revocation was rebuttable and rebutted. But see *Nutt* v. *Norton*, 142 Mass. 242 (1886).

[2] Only the opinion is printed.

of those circumstances should not stand good. And the practice of the courts has been very correctly stated by the learned counsel who have argued this case on the part of the appellants.

But the case of *Fox* v. *Roe dem. Marston*, being now the last decision upon this point, must, to a certain extent, govern the proceedings in the ecclesiastical courts, and the principles upon which those cases (if any should hereafter arise) are to be determined: because in that case it is expressly laid down that it does not depend upon the presumed intention that the deceased would alter his will under the change of circumstances, but that the rule is, that it is to be considered a *tacit* condition annexed to the will, that at the time of making that will it should not have any effect, provided the deceased had a wife and child of the marriage subsequently born; and that is the rule now which must be applied, not only in the courts of common law, but also to any cases which may arise in the ecclesiastical courts, with respect to personal property.

Under these circumstances, then, it would be to be considered, whether, this being a tacit condition annexed to the will at the time of making it, it does not amount to something more than has been usually contended for in the ecclesiastical court, namely, a presumed intention to revoke, or a presumed revocation, which might be rebutted by circumstances; in short, whether it does not amount to an absolute revocation, so that the will should require to be set up by that which would amount to a publication in the first instance, or a revocation of it.

In this state of things, therefore, looking at the principles which have been laid down in the case of *Marston* v. *Roe dem. Fox*, without entering at present into the question, what are the particular circumstances of this case, we think, as I understand their Lordships, that this being a case of *tacit* condition annexed to the will at the time of making it, it must speak from the time at which the will was made, and not, as has been contended for, from the death of the testator, though that certainly has been the doctrine held in the ecclesiastical court, and is founded upon some of the expressions made use of by the judges in the case of *Brady* v. *Cubitt*, Doug. 30, 40, or in the case of *Lancashire* v. *Lancashire*, 5 Term R. 49. For it is expressly so laid down by the Lord Chief Justice of the Common Pleas, in delivering the judgment in the case of *Marston* v. *Roe dem. Fox*, where, speaking of the proposition that acquired property, after the will is made, descending to children, would have the effect of preventing a revocation of the will, he says, "Such a proposition seems incompatible with the nature of a condition annexed to the will, which, so far as relates to the existence or extent of the provisions, must, in its own nature, have reference to the existing state of things at the time the will itself was made." Therefore the existing circumstances with reference to which the *tacit* condition is supposed to be annexed to the will, must be those which existed at the time when the will itself was made, and when the con-

dition was annexed to it. And looking at it in that point of view, it seems that the question in the first instance to be considered is, What was the state of things at the time when the will was made, when the *tacit* condition is supposed to be annexed to the will, upon which that will was to cease to have effect and operation?

Now it is admitted, that by the will as it originally stood the whole of the personal and real property of the deceased was disposed of. It commences with disposing and bequeathing "all my personal estate whatsoever and wheresoever, except my moiety of such stock and chattels as may be upon or belonging to Frankfield plantation and Crawle River estate, in the Island of Jamaica." That is given to the four sisters of the deceased, in equal proportions; and the real property, that is the estate which he had reserved, and the stock upon his real property, is given to his brother. There is, therefore, at the time the will is made, a complete disposition of the whole of the property of the deceased. If he should marry and have a child, this will, as it then stood (supposing it not to be revoked by those circumstances), would leave the widow and the children, the issue of that marriage, totally without provision.

But it is said that though this will was so at the time when it was made, yet the settlement upon the marriage takes a certain portion of the property out of the operation of the will, and therefore the whole of the property is not disposed of. Now supposing that the consideration, as to the existence or the extent of the provision, is to be applied to the state of circumstances at the time the will was made; then the mere circumstance of there having been a portion of the property taken out of the operation of the will, ought not to be taken into account in considering the will, if the will is to speak from the time at which it was made, and when it was a complete disposition of the whole of the testator's property. But in fact, in this case it is quite impossible to know what provision is made for the children of this marriage: what is the value of the property is not stated in any part of these proceedings. When I asked in the course of the argument what the amount of property as sworn to in the Prerogative Court of Canterbury was (for it appears by the proceedings that the will was proved in the Prerogative Court of Canterbury), so that we might have that fact before us by sending for the original will, it appears to be £18,000, a very considerable sum undoubtedly to be paid not to the issue of the marriage, but for the benefit of sisters, who may be treated here as strangers to the deceased.

The amount of the property in all these cases has been taken into consideration in the decisions in the ecclesiastical court; and as it is stated in the arguments in *Johnson* v. *Wells*, 2 Hagg. Eccle. Rep. 561, and in *Talbot* v. *Talbot*, 1 Hagg. Eccle. Rep. 705, it formed a very material ground upon which the case was decided. For looking at it as a case of presumed intention, the amount of the property, and the division made, would be a very strong argument either for or against the

presumed intention to revoke. In the cases of the marriage of a widower, as in *Talbot* v. *Talbot*, and *Johnson* v. *Wells*, it should be observed that the children of the second marriage, under the settlement (whether it was from the second wife's property or the husband's is not material), took a larger proportion of the property than the children of the first marriage; and it was considered a strong argument against the intention to revoke, that it would have that effect, and therefore it was not considered merely with reference to the evidence of intention, but with reference to the value of the property, and to the proportion which it would give to the children of the second marriage, in comparison with that which it would give to the children of the first. All those circumstances were made to bear upon the question, whether the deceased could be supposed to have intended to revoke his will; and in those cases, under all the circumstances, the court was of opinion that the will was not revoked. But that would not bear upon the question of annexed condition, because if the annexed condition is, that the will should not operate upon the occurrence of certain circumstances, then when those circumstances have occurred, the will itself is revoked. And looking to the decision in *Fox* v. *Roe dem. Marston*, it appears to us, that that is the rule which must be applied for the decision of these cases in future.

If, however, we examine the circumstances of this particular case, what are they? Here is a portion of the property, whether large or small, taken as a provision for the wife and for the children of the marriage; and it is said that this must have been considered by the deceased as a sufficient provision for them; and that consequently he did not intend at that time to make any further provision. Now, under the particular limitations in this settlement, it seems that the object is to provide, that that property shall not be subject to those accidents, to which the property of persons engaged in mercantile transactions is supposed to be liable: that in case of bankruptcy or insolvency, still the wife should have a maintenance out of the property, and the child after her death. But it by no means follows, that because the deceased chose to take this part of his property and secure it against accidents of that description, that therefore he considered it an adequate provision, with reference to the property he possessed; it is much more natural to suppose that the deceased did this for the purpose of securing a provision at all events; leaving the personal property to be disposed of, as subsequent occurrences in his life, or his feelings, might direct. It is to suppose that the deceased was ignorant of the law, when it is said that this provision was considered by him with reference to the whole amount of his property, as an adequate provision for his wife and the children of the marriage. Now it seems to me that there is no reason to suppose that the deceased was ignorant of the law, or that he supposed that his will would not be revoked by the settlement that had been made. There is no evidence from anything that appears in the case, that the deceased ever entertained such a supposition, as that

this settlement would prevent the operation of the law, by which the will made before the marriage and birth of children would be revoked. There is nothing to lead to such a conclusion, and I think, taking all the circumstances together, especially the circumstance of the will not being in the deceased's possession at the time, but being left in England, and he himself being resident in Jamaica, there is nothing to be collected from his not having revoked this will, or not having given instructions to his solicitor to revoke it. In point of fact, the time was not come. The birth of the child, which was to have the effect of revoking the will, had not occurred, and possibly might not occur, and then the will stood good. And why should he take upon himself to revoke that will, which in point of fact he intended to have effect and operation, if the event did not take place, by which the operation was to be prevented? Looking at all the circumstances of the case, it is the opinion of their Lordships that the will has been revoked by the circumstances that have occurred; that even supposing the question had remained unaffected by the decision in *Marston* v. *Roe dem. Fox*, still considering it upon those principles which have been applied to cases in the ecclesiastical court, the will would have been revoked under the circumstances of this case, a provision not appearing to have been made, which would have been sufficient to have repelled the presumption of an altered intention on the part of the deceased, in consequence of the change in his condition. Their Lordships are of opinion therefore that the sentence of the court below must be affirmed.

The Queen's Advocate (*Sir John Dodson*) and *Mr. Burge*, Q. C., for the appellants.

Mr. Pemberton, Q. C., and *Dr. Addams*, for the respondents.[1]

GOODS OF CADYWOLD.

COURT OF PROBATE. 1858.

[*Reported* 1 *Sw. & Tr.* 34.]

T. C. DIED in 1857, leaving a duly executed will, dated the 29th March, 1828, whereof he appointed Elizabeth Soundy, spinster (afterwards Elizabeth Cadywold), his intended wife, and two others, executors.

By his will he devised all his real estate to E. Soundy, his intended wife, for life, and after her death he directed his executors to sell the same, and bequeathed the money to arise from such sale to and amongst all and every his child or children by his said intended wife living at his

[1] For the law of the ecclesiastical courts before this decision, see *Johnston* v. *Johnston*, 1 Phillim. 447 (1817); *Talbot* v. *Talbot*, 1 Hagg. Ecc. 705 (1828); *Johnson* v. *Wells*, 2 Hagg. Ecc. 561 (1829); *Fox* v. *Marston*, 1 Curt. 494 (1837).

decease or born in due time afterwards, and the residue of his personal estate he bequeathed to Elizabeth Soundy, his intended wife, for her own use absolutely.

Subsequently to the execution of this will the deceased intermarried with Elizabeth Soundy, and died leaving his said wife and four children of the marriage him surviving. Mrs. Cadywold having been at first advised that the will was valid on the authority of *Kenebel* v. *Scrafton*, 2 East, 541, applied to the registry as executrix (the two other executors having renounced) for probate, and was there directed to make application to the court.

Dr. Addams, Q. C., said he was instructed to move for probate of this paper, but, the law being as held in *Marston* v. *Roe d. Fox*, and *Israell* v. *Rodon*, he apprehended it could not be granted.

Sir C. Cresswell. It seems at first sight rather startling to say that a will like the present, executed in contemplation of marriage, and providing for the wife and children of the marriage, should be revoked by such marriage and the birth of a child; but on the cases you have cited, there is no doubt that the law so stands, and I must reject the motion for probate.

Note. — In Iowa it has been *held*, in the absence of any State Statute, that the birth of a child alone revokes a will. *McCullum* v. *McKenzie*, 26 Iowa, 510 (1868); *Negus* v. *Negus*, 46 Iowa, 487 (1877). In Illinois, where a wife takes as heir all her husband's real estate if he dies without issue, marriage alone is held to be a revocation of a prior will. *Tyler* v. *Tyler*, 19 Ill. 151 (1857).

SECTION III.

REPUBLICATION AND REVIVAL OF WILLS.

A. *Republication.*

BECKFORD *v.* PARNECOTT.

Queen's Bench. 1596.

[*Reported Cro. El.* 493.]

Ejectione firmæ. Upon a special verdict the case was, that one Richard Parsons was seised of divers lands in Aldworth, and had issue four daughters, viz.: Barbara, Joan, Frances, and Mary; and 27 Eliz. made his will in writing, and thereby devised all his lands in Aldworth to Barbara and Joan his daughters, and made them his executrixes; and after in 33 Eliz. purchased other lands in Aldworth (which are the lands in question); and after one J. S. came to the devisor and desired that he would sell unto him those lands which he lately purchased; and he said, "No, they shall go, with my other lands in Aldworth, to my executrixes." Afterwards in 34 Eliz. he being sick, the will was read

unto him, and he said nothing thereto; but then gave divers legacies of goods to others, and caused them to be written and annexed in a codicil thereto, and died. Whether those lands newly purchased shall pass to the executrixes by that will? was the question: viz., Whether by those words used to a stranger, or the annexing of the codicil to the will, being only concerning goods, be as a new publication of his will to make those lands to pass, &c.— First, it was agreed by the counsel on both sides, and by the Justices, that if the devisor after the purchase of that land had made a new publication of his will, and showed his intent that those lands should pass, it had been a good devise of them; for the words in the will are, "all his lands in Aldworth," which are apt enough, and sufficient to carry them; and he could not have added more apt words thereto. But afterwards all the Justices (Gawdy *absente*) held, that it is a new publication of his will, and sufficient by the words to J. S. for that shows his intent sufficiently, and the will writ hath words sufficient. And Fenner held, that the annexing of the codicil thereto is a new publication as to it; for therein he affirmed that it should be his will at that time. But the other Justices doubted thereof, because he doth not show thereby any intent that this will should be for his purchased land; nor that he then remembered them. But for the reasons before, it was adjudged for the plaintiff, that those lands well passed by the will.

IZARD *v.* HURST.

Chancery. Before Sir John Trevor, M. R. 1698.

[*Reported Freem. C. C.* 224.]

The defendant's testator by his will gave his four daughters £600 apiece, and afterwards married his eldest daughter to the plaintiff, and gave her £700 portion; after that he makes a codicil and gives £100 apiece to his unmarried daughters, and thereby ratifies and confirms his will, and dies; and the plaintiff preferred his bill for the legacy of £600 given to his wife by the said will; and the only question was, whether the portion given by the testator in his lifetime, should be intended in satisfaction of the legacy? And held that it should; and agreed to be the constant rule of this court, that where a legacy was given to a child, who afterwards upon marriage or otherwise had the like or a greater sum, it should be intended in satisfaction of the legacy, unless the testator should declare his intent to be otherwise; and it was said the words of ratifying and confirming do not alter the case, though they amount to a new publication, being only words of form, and declare nothing of the testator's intent in this matter.[1]

[1] "In my opinion, then, when it is said a codicil republishing a will, or confirming a will, makes the will speak from the time of republication, that does not mean that

BARNES *v.* CROW.

CHANCERY. 1792.

[*Reported* 4 *B. C. C.* 2.]

WILLIAM BALCOMBE, being seised and possessed of real and personal estate, made his will, bearing date 29th November, 1784, duly attested to pass real estate, and thereby gave and devised all his messuages, &c., and all other his real estate, situate at Feversham, in the county of Kent, or elsewhere, to the plaintiffs in trust to sell, and dispose of the money arising therefrom, in the manner thereby directed. After making the said will, the testator made a codicil thereto, bearing date 5th November, 1785, not duly attested to pass real estate, and by which he made some provisions arising from the marriage of one of his daughters. After the making and publication of his will and such first codicil, he contracted with Richard Horton, for the purchase of an equity of redemption of premises in Feversham, then in mortgage to Mary Hulbard, for a term of five hundred years; and Richard Horton, by indentures of 2d and 3d January, 1786, conveyed to testator and his heirs, the premises, subject to the mortgage debt, and Mary Hulbard dying before the mortgage-money was discharged, the executors,

you are to read the will in any way different from the mode in which it would have been read if the testator had died the moment after he had executed it. What absurdities otherwise would arise. Suppose I by my will say I give £500 to the present treasurer of Lincoln's Inn, and this day twelve months I republish my will, does that alter the party who is to take the legacy? That must be so, if it is to be read as if I had written it over again; the 'present' treasurer would be a different person. So I conceive if I had said, I devise all the estates of which I am now seised. I afterwards purchase lands and republish my will. I confess I think the same principle applies as governed Lord Cottenham in *Cole* v. *Scott* [1 Hall & Tw. 477]. My will must be read in the same way as if I had said, I give all the lands of which I, on this 24th day of March, 1851, am seised, and if I republish that in 1852, it will still be read just as it was before; it will refer only to that which is there mentioned. Now, the cases in which this question has often arisen and with which we are familiar are these: where a party says by his will, 'I give all my lands,' what does that mean? All the lands that I have power to give. When, a year afterwards, I republish that will, having intermediately purchased lands, it will apply to the after-purchased lands. It is to be read just as if I had put in those words, 'all the estates which I had power to give.' Therefore, it seems to me that the distinction is manifest between an express date or an express name fixed upon. You cannot alter that by saying you republish the will at a different time. You do republish it so as to make it operate from that other later time, and if there be any legal effect that is brought to operate by what has taken place in the mean time, you have the benefit of that. But you cannot alter the meaning of the will, which you will be doing if, by republishing the will, you are to treat the testator as having meant something by his will different from that which he has there expressed. With regard to the case in the Court of Error of *Williams* v. *Goodtitle* [10 B. & C. 895], I think that is all perfectly intelligible and right. A testator there, under the old state

by indentures of 4th September, 1786, in consideration of the payment of the mortgage-money and interest due, conveyed (by the direction of the testator) the term of five hundred years to Thomas Roper, and the testator covenanted to pay the mortgage-money, and entered into a bond to Roper for that purpose. After this transaction, the testator made another codicil to his will, dated 27th October, 1788, whereby he made some alterations in the state of his affairs, and disposed of a leasehold estate, but which did not mention the lands purchased since the date of the will, which concluded thus: "In witness whereof I, the said testator William Balcombe, have to this my writing contained in this, and part of the preceding sheet of paper, which I declared to be a codicil to my said last will and testament, and which is to be accepted, and taken as part thereof, set my hand, &c.," and the execution thereof was attested by three witnesses.

The first codicil was begun and partly written upon the last sheet of the testator's will, and was a continuation from the foot of the said will, and the second codicil was begun, and partly written upon the last sheet of the first codicil, and was a continuation from the foot of the said first codicil, and the testator's will and codicils were annexed to each other, by, or at the request of, the testator.

The defendants, who were heirs-at-law and in gavelkind of the testator, having got into possession of the lands purchased after the will, the devisees in trust filed the present bill, submitting that the latter codicil was a republication of the testator's will, and that the after-purchased lands passed thereby, and praying a declaration to that

of the law, devises all his lands: that passes all he was then seised of; he republishes his will afterwards by a codicil, the legal effect of that is to pass after-purchased land, because the will speaks from that time. In both cases it means all the lands he had power to dispose of by law. The effect could not be altered by the circumstance that in his codicil he truly recites that by his will he had devised all he was then seised of; it only states what is the legal effect of his will. He republishes his will: the legal effect of republishing it must have its full operation. It does not seem to me that that case at all presses upon me. I was turning in my mind whether I could recollect any cases in which there was this sort of devise, 'I give to all my present children,' then an after-born child, and a codicil republishing the will: certainly, according to my impression, that would not give to the after-born child. I am not clear that that would quite govern the case, because the courts have stretched a good deal about children in a way that they have not done in other cases. I rather think that it would not. At the same time, I was not prepared for this sort of argument, and have therefore not looked into the point. If, upon looking into it, or being assisted by any suggestion from counsel on one side or the other, anything should be brought to my mind to show I am wrong, I should be most ready to admit it, and the more so because I do firmly believe that this would have been what the testator would have wished to do if his attention had been called to it. I think, although I cannot so construe what he has written, I do form a very shrewd guess as to what he would have written if his attention had been called to it, and he would have wished to write something which would have the meaning that it is contended the republication of the will does give to it. I do not find that within the four corners of the will, therefore I do not act upon it as the intention which is to govern me." — *Per* Lord Cranworth, V. C., in *Stilwell* v. *Mellersh*, 20 L. J. Ch. 356, 361 (1851).

purpose, and that the defendant might be decreed to deliver to the plaintiffs possession thereof.

Mr. Solicitor-General and *Mr. Hall*, for the plaintiffs.

Mr. Selwyn and *Mr. Abbot*, for the defendants, the heirs-at-law.

Mr. Mitford and *Mr. Alexander*, for defendants in the same interest with the plaintiffs.

Lord Commissioner Eyre pronounced the judgment of the court to this effect: —

This cause stood over, in order that the court might look into the cases of *Acherly* v. *Vernon* [Com. 381], and *Attorney-General* v. *Downing* [Amb. 571].

The question might be considered as of great difficulty, if it was not so determined that the court is not at liberty to review it; because the two cases seem to be directly opposite. But it appears that *Acherly* v. *Vernon* is determined; and it is a case of such authority that everything must give way to it, and must be considered as determined by it. It is a case of great weight, because it was first determined by Lord Macclesfield, and affirmed by the House of Lords, after questions put to the judges. It was there held that the codicil, "ratifying and confirming the will," amounted to a republication, and became incorporated with it. It is matter of deduction from thence, that the publication of such a codicil in the presence of three witnesses, is a republication of the will.

There are four cases stated, in the report of that case, as having been cited; two of which seem of importance. In the first (*Lytton* v. *Lady Falkland*) the words were, "I make this codicil, which I will shall be added to, and be part of, the will I have formerly made." Here was a manifest reference to the will, and a declaration that the codicil was meant to confirm it, and all that annexation relied upon in the *Attorney-General* v. *Downing*. Lord Cowper, assisted by Sir John Trevor, Master of the Rolls, Lord Chief Justice Trevor, and Mr. Justice Tracy, decreed it was no republication, "because, since the Statute 29 Car. 2, there can be no devise of lands by an implied republication; for the paper in which a devise of lands is contained, ought to be re-executed in the presence of three witnesses." This was on the 16th June, 1708.

In the other case, *Penphrase* v. *Lord Lansdown*, 11 Ann, upon the Earl of Bath's will; the will was made 11th Oct., 1684, and only executed: but on the 15th August, 1701, the testator made a codicil, and, sending for seven persons, published it in these words: "This is my will, and I publish this codicil as part thereof." Here was a strong republication of the will; but it was held by Parker, C. J., and the Court of King's Bench to be no republication, for, since the Statute 29 Car. 2, there shall be no republication by implication, but the will must be re-executed, otherwise a devise of lands shall not be good. But, at the importunity of the defendant, a special verdict was found.

Here is a rule of construction upon the Statute of Frauds, clearly expressed and positively laid down, by the first men of their day, and that early after the passing of the Statute, that there cannot be an implied republication; nothing short of a re-execution of the will shall be sufficient. In *Acherly* v. *Vernon* it is clear, that Lord Macclesfield did not adhere to his own rule in *Penphrase* v. *Lord Lansdown*, because the will was there (in *Acherly* v. *Vernon*) held to be republished without re-execution, and consequently must have been republished, notwithstanding the Statute of Frauds, by implication.

If the rule first laid down by Cowper and Lord Macclesfield is not sound, and the will may be republished by implication, I do not wonder that Lord Hardwicke, in Amb. 93 (*Gibson* v. *Rogers*), should express doubts on the special grounds, upon which it was argued before him, that a codicil executed before three witnesses might amount to a republication, and inclined to agree that every codicil duly attested may be a republication of the will.

If we disentangle ourselves from the rule, the declaration of the testator at the publication, as to a former will, must be admitted, because the codicil becomes part of that former will; and the will being attested by three witnesses, the declaration is attested by three witnesses, and does not break in upon the principle of the Statute.

Before the Statute, any declaration of the testator would have been sufficient to republish the will: since the Statute, a re-execution seems not necessary, but the declaration must be in writing, and attested by three witnesses. With respect to the words used in the declaration, Lord Hardwicke might well say, in *Gibson* v. *Rogers*, that he could see no great difference between the words used there, "I desire that this codicil may be adjudged to be part and parcel of my will," and the words, "I confirm or republish my will," which it had been admitted in the argument would have been sufficient.

In the *Attorney-General* v. *Downing*, Lord Camden supposed that a particular intent to republish ought to appear, and that annexation, or a particular declaration in the codicil, of the intent, would be sufficient.

If so, not only Lord Hardwicke's opinion, but *Acherly* v. *Vernon*, cannot stand; for, as there was no express republication, but the testator referred to, and made alterations in the will, and gave demonstration that he considered it as his will, — and that was considered as a republication: but he had it not in his intention to do any formal act to republish his will.

I am inclined to stand upon the general proposition of Lord Hardwicke, and to think that the will before us was republished.

The present case has circumstances that seem to bring it within that of the *Attorney-General* v. *Downing*. The testator meant his will to operate upon all his lands, and thought that the will was brought down, by the codicil, to the time of his death. He has annexed the codicil to the will, not by wafers, or folding them together, but by an internal

annexation. So that, in fact, the whole was published together, at the time of publication of the codicil. But I am afraid of relying upon these circumstances, for fear of intrenching upon the Statute of Frauds, by raising a republication out of evidence in its nature parol: I think it better, therefore, to rely on the general ground.

The next question is, what will be the effect of this opinion upon the cause; upon which I have a doubt. The prayer of the bill seems to seek a declaration from us, that the codicil is a republication of the will, and acts on the after-purchased estate. The question of republication might have been tried at law in an ejectment.

Mr. Hall, for the plaintiffs (in the absence of *Mr. Solicitor-General*), stated, that the bill charged the estates in question to be affected by a mortgage-term then outstanding, that the heir was in the possession, and prayed that the defendants might deliver up such possession to the plaintiffs. That notwithstanding the case of *Bristow* v. *Pegge*, 1 Term Rep. 758, and other similar determinations in the time of Lord Mansfield, in which it had been held, that, as between the heir and devisee a mortgage-term could not be set up to nonsuit the plaintiff in ejectment, but the plaintiff should recover subject to the charge: yet, in the subsequent case of *Doe, on the demise of Hodsden* v. *Staple*, 2 Term Rep. 684, a contrary doctrine had prevailed, it having been there determined, that a plaintiff must recover on a legal, not an equitable title, for that a mortgage may be set up as a bar to the plaintiff, even though he claim only subject to the charge; therefore a court of equity alone could, in the circumstances of this case, administer relief.

Lord Commissioner Eyre assented to this; and declared, that, in those circumstances, the ground for equitable interference was plain, and proceeded to pronounce the decree; by which he

Declared the will well proved, and the trusts to be carried into execution; that the codicil is a republication of the will, and the after-purchased estate passed thereby.

After the decree pronounced, Mr. Mitford mentioned a case of *Billing* v. *Turner*, before Lord Kenyon at the Rolls, where there was a similar decree.

Lord Commissioner Wilson also added the case of [*Doe* v. *Davy*, Cowp. 158, as of the same sort, though relating to copyholds;[1] and] *Heylyn* v. *Heylyn*, B. R. 15 Geo. 3, Cowp. 130, where the codicil was held a republication, and observed, that the testator, saying "I desire the codicil shall be part of my will," is equivalent to saying they shall be one instrument.[2]

[1] This is from Lord Colchester's MS. notes, and Mr. Vesey, junior's Rep. p. 499. — Belt.

[2] See *Pigott* v. *Waller*, 7 Ves. 98 (1802); *Goodtitle* v. *Meredith*, 2 M. & S. 5 (1813); *Earl's Trust*, 4 K. & J. 673 (1858). — Ed.

CROSBIE *v.* MACDOUAL.

CHANCERY. 1799.

[*Reported* 4 *Ves.* 610.]

GENERAL CROSBIE,[1] by his will, dated May 27, 1790, and attested by two witnesses, directed that all his debts, legacies, and annuities, therein mentioned, should be fully paid and satisfied, and also such other annuities and legacies as he should at any time hereafter leave by any codicil or codicils or note or memorandum thereof in his own handwriting should be taken as a part thereof; and subject thereto he gave all his personal estate to three trustees in trust to purchase land upon the trust in the first place to secure the several annuities after given. He gave an annuity for life to each of his two sisters, and also an annuity of £200 for life to his sister-in-law, Sarah Crosbie; then, after some other annuities, he gave Sarah Crosbie, in case she should survive her husband, an annuity of £300 for life, over and above the annuity before given to her; and after payment of the said annuities, and all such annuities and legacies as he should give by that will or any codicil or codicils in writing, he directed the land purchased to be held in trust for his brother for life, with remainders over.

By two codicils, dated May 29, 1790, the testator gave some annuities and legacies.

By a fourth codicil, dated June 2, 1795, duly executed to pass real estate, he revoked the bequest of the annuity of £200 and all other bequests to Sarah Crosbie, and settled all his real and personal estate on his natural son, Charles Carr Carmichael.

By a fifth codicil, dated June 4, 1795, the testator, reciting that he had made his will, dated May 27, 1790, and had thereby appointed John Jackson to be one of his executors and trustees, now appointed Robert MacDoual to be executor and trustee in place of John Jackson. This codicil ended thus: "And I do hereby confirm my said will in all other respects." This codicil was unattested.

On a bill by the testator's brother and nephew for administration, the only question was whether the annuities given to Sarah Crosbie, which were revoked by the fourth codicil, were not revived by the fifth.

Mr. Mansfield and *Mr. Lloyd*, for the plaintiffs; and *Mr. Bell*, for the defendants in the same interest.

The Solicitor-General, for Sarah Crosbie.

MASTER OF THE ROLLS. [SIR RICHARD PEPPER ARDEN.] When this case was stated, I had no doubt upon it; and the Solicitor-General has not been able to succeed in applying that case upon Lord Orford's will, upon the authority of which alone he rests, to this. I shall give my opinion at present, having very little doubt; and if upon reading that

[1] The following abbreviated statement is substituted for that in the report.

case I see any reason to alter that opinion, I will mention it on Monday.

The testator by his will gives two annuities to Sarah Crosbie. By the fourth codicil he revokes those annuities. Two days after the execution of that codicil, it is said (but that I lay totally out of the case; for I cannot say, two days will furnish a presumption, that four days or ten days would not furnish) but two days after the execution of the fourth codicil the testator makes a fifth, expressly calling it a codicil to his will; by which he substitutes one executor for another: and then in the common way, quite unnecessarily, he declares, that is the only point in which he makes any alteration in the will; for that is the real meaning of those words; that having altered his will in one respect he means to alter it in no other. The question then is, whether the fourth codicil, so far as it is inconsistent with the will, is revoked in consequence of this reference by the fifth to the will; which indeed is the case of every codicil; which must refer to some will, the last in date, if no express date is mentioned; if there is, that of the particular date expressed. The case upon Lord Orford's will only determines, that a codicil referring to a former will as the last will cancels intermediate wills. But the point contended in this case is, that it sets up all the will against a codicil revoking it in part. That case will not by any means bear out that argument. It is perfectly true, that if a man ratifies and confirms his last will, he ratifies and confirms it with every codicil that has been added to it. There is a great distinction between wills and codicils in this respect. If there are two separate papers, both called wills, inconsistent with each other, it is not the rule to prove both in the ecclesiastical court. The last is the will. From the nature of the instrument it revokes the other. If the last purports to be the whole will, a complete, substantive will, they do not, I conceive, prove both. Unless there is something to show it was meant to be coupled with another instrument, it is not taken to be a codicil. But if it does purport to be coupled with another instrument, it is as much a part of that instrument as if it was written upon the same paper. Many absurdities would follow from the contrary construction. Suppose the testator had by his will given a legacy of £200, and by a codicil had given the legatee £100 instead of the £200, and then should make another codicil, of this sort, merely changing an executor, and ratifying and confirming his will in all other respects. Is the legatee to have both the £200 and the £100? That must be contended.

The true rule upon the subject appears to me to be as I have stated. The Solicitor-General confesses, that if it was not for the case of *Lord Walpole* v. *Lord Orford*, 3 Ves. 402, he should scarcely have been able to argue it: but he thinks that case affords him a sufficient ground. It differs in this essential point. There was no question in that case upon a will and a codicil. The question was upon two inconsistent wills; one made in 1752; the other in 1756. The second had destroyed the first, unless the testator thought fit to revive it. By a codicil in 1776 he expressly declares it to be a codicil to his last will and testament, dated

the 25th of November, 1752. That was held to cancel the intermediate will. All that the courts of law, first the Court of Common Pleas, and afterwards the Court of King's Bench, determined, was, that evidence could not be admitted to prove the mistake, and that the testator did not mean to refer to the will, to which the codicil did expressly refer. It was said, that it really arose from the mistake of the person employed to draw the codicil; who took the wrong will. Both the courts of law were of opinion, they could not receive evidence of that: as the testator had solemnly declared, the will of 1752 was his last existing will. It would not at all affect the case of any codicil made as an appendix to either of his two wills. If the will had dropped, perhaps a codicil, professedly a codicil to that will, would have dropped with it. That might have been a nice question; whether a codicil, which in words referred only to the will of 1756, would not have fallen with that will. I will look into that case before Monday; and if I see any reason to alter my opinion, I will mention it.

Declare, that the annuities of £200 and £300 given by the will of Sarah Crosbie were and remain revoked by the fourth codicil.

(The case was not mentioned again.)

GREEN *v.* TRIBE.

CHANCERY. 1878.

[*Reported* 9 *Ch. D.* 231.]

ELIZABETH LOVE, by her will dated the 9th of February, 1872, gave to trustees the sum of £1,000 upon trust to invest the same, and to pay the income to her niece, Ellen Love, during her life, and after her decease upon trust for her children as therein mentioned. And the testatrix devised her residuary real estate to trustees on trust for sale, and gave to the same trustees the residue of her personal estate, and the proceeds of the sale of her said real estate, upon trust as to two sixteenths thereof to pay the same unto her nephew Stephen Love, and as to two other sixteenths thereof upon such trusts for the benefit of her niece Ellen Love and her issue as were therein declared of the said sum of £1,000 bequeathed for her benefit.

Elizabeth Love made a codicil dated the 27th of August, 1872, as follows: "This is a codicil to the last will and testament of me, Elizabeth Love, of Filstone, in the parish of Shoreham, in the county of Kent, spinster, which will bears date the 9th of February, 1872. I do hereby revoke and make void every gift, devise, appointment, and bequest made by me in and by my said will to or in favor of my niece Ellen Love and my nephew Stephen Love respectively. I confirm my said will in all other respects."

Elizabeth Love made a second codicil dated the 14th of April, 1873, as follows: "This is a codicil to the last will and testament of me,

Elizabeth Love, of the parish of Shoreham, in the county of Kent, spinster. Whereas since the date of my said will I have purchased two messuages with the outbuildings, gardens, and premises thereto belonging, situate and being Nos. 5 and 6, Camden Villa, London Road, in the parish of Sevenoaks, in the county of Kent. And I have contracted to purchase two other messuages with the outbuildings, gardens, and premises thereto belonging, situate and being Nos. 9 and 10 Granville Road, in the said parish of Sevenoaks, but the purchase whereof has not yet been completed. Now I devise the said four messuages and premises respectively, with the appurtenances and all other the real estate, if any, which I have acquired or contracted to purchase since the date of my said will unto my brother Samuel Love, my brother-in-law John Tribe, my nephew Frank Green, and William Francis Holcroft, the trustees and the executors named in my said will, and to their heirs, to, upon, and for the several uses, trusts, intents, and purposes in my said will expressed and contained of and concerning my residuary real estate (other than the messuage, cottage, and premises thereby devised to my said brother Samuel Love for his life as therein mentioned). And I declare that the produce of the sales of the messuages and hereditaments hereby devised as aforesaid shall fall into and form part of my residuary and personal estate thereby bequeathed and shall be divided in the same proportions and for the benefit of the same parties as in my will is expressed and declared of and concerning my said residuary personal estate, and that each share respectively shall be subject to the same trusts, restrictions, and limitations over in all respects as the original share thereby bequeathed, and as if the share hereby bequeathed had actually formed part of my said residuary personal estate disposed of by my said will. In other respects I confirm my said will."

Elizabeth Love died in September, 1873, and this action was brought for the administration of her estate. Two of the questions argued on the hearing were, whether the second codicil revoked the first codicil; and if not, whether the messuages comprised in the second codicil would go according to the terms of the residuary devise in the will alone, in which case Stephen Love and Ellen Love would take each two sixteenths, or would go according to the will and first codicil together, in which case Stephen Love and Ellen Love would take nothing.

North, Q. C., and *G. E. Cruikshank*, for the plaintiff.

Cookson, Q. C., and *Macnaghten*, for other parties.

C. Browne, for the heir of the testator.

Kekewich, Q. C., and *Badcock*, for Ellen Love.

Fry, J., after stating the facts of the case, continued: —

It appears from the statements made by the plaintiff, which are not disputed by the defendants, that the purchase, a recital of which is contained in the second codicil, had been made by the testatrix after the 9th of February, 1872, the date of her original will, but before the 27th of August, 1872, the date of her first codicil. This being so, it appears

to me that the second codicil must be read as if the last will and testament there referred to had been described by its proper date, and as if the testatrix had declared that the second codicil was a codicil to her last will and testament of the 9th of February, 1872.

Upon this state of facts two questions have been raised before me. First, did the second codicil revoke the first codicil, and revive the original will in all its dispositions, and consequently restore Ellen Love and Stephen Love to the position of legatees under that will? Secondly, if this were not the case, was the real estate specifically mentioned in the second codicil devised upon the terms of the original will unaffected by the second codicil?

Both these questions must be determined by the answer to a third question, which is this: Assuming a testator to have made a will, to have made a first codicil modifying that will, to have made a second codicil describing his will by the date which the original instrument bore, and confirming that will, but observing an absolute silence with regard to the first codicil, what is the effect of the second codicil? Does it revive the first will as it originally stood, or does it confirm the original will as modified by the first codicil?

The general principle I take to be clear. On the one hand, where a testator in a codicil uses the word "will" abstractedly from the context, it will refer to all antecedent testamentary dispositions which together make the will of the testator, and consequently where the testator by a codicil confirms in general terms his will or his last will and testament, the will, together with all codicils, is taken to have been confirmed. "The will of a man," said Lord Penzance in *Lemage* v. *Goodban*, Law Rep. 1 P. & M. 57, "is the aggregate of his testamentary intentions so far as they are manifested in writing, duly executed according to the Statute." On the other hand, it is equally clear that the testator may by apt words express his intention to revoke any codicil already made, and to set up the original will unaffected by any codicil. The question, therefore, which I have to consider is, whether the reference to the date of the original will is an indication of the intention to deprive all instruments other than the original will itself of any force — in fact, whether such a reference to a will effects a revocation of the antecedent codicils. To this inquiry a series of cases appears to afford a clear negative answer. The first to which I desire to refer is the case of *Crosbie* v. *Macdoual*, 4 Ves. 610. There the testator made a will and five codicils, and a question arose as to the effect of the fifth codicil upon the fourth codicil, by which certain annuities had been given. The fifth codicil recited the making of the will and the date which it bore, substituted one executor in the place of another, was silent as to all antecedent codicils, and concluded by confirming the testator's said will in all other respects. The then Master of the Rolls held that the fourth codicil was not revoked by the fifth. This decision rested upon two propositions. The first, that if a man ratifies and confirms his last will he ratifies and confirms it with every codicil that has

been added to it. The second, that the ratification of a will described by its date is a ratification of the will as modified by the codicils, and therefore does not revoke the codicils which were made between the date of the will and the confirming codicil. In the case of *Smith* v. *Cunningham*, 1 Add. 448, a similar question arose. There the testator made first a will, then five codicils in succession, then a sixth codicil, by which he confirmed and republished his will and two codicils describing the will, and two codicils by the dates which they respectively bore, and it was held that the sixth codicil did not effect a revocation of the three unmentioned codicils. The court held, in the first place, that the intention to revoke must be clear and unequivocal; in the second place, that no clear inference in favor of the revocation arose from the language of the sixth codicil; and, thirdly, that, looking at all the circumstances to ascertain the intention of the testator as to what instruments should operate as and compose his last will, as the Court of Probate was in the habit of doing (*Greenough* v. *Martin*, 2 Add. 239), there was no intention to revoke. In *In the Goods of De la Saussaye*, Law Rep. 3 P. & M. 42, a case which came before Sir James Hannen in the year 1873, a similar point arose. The testator there first made a will, he then made three codicils in Spain, he then made a codicil in England by which he revoked certain dispositions contained in his will, which he described as executed in London on the 12th of March, 1869, and concluded by confirming the dispositions contained in his will of the 12th of March, 1869, in whatever did not clash or interfere with the contents of that codicil. The question arose whether the express reference to the will of the 12th of March, 1869, implied an intention on the part of the testator to revoke his Spanish codicils. The court held that it did not, on the ground that those codicils were to be deemed parts of the will, and were themselves confirmed by the ratification of the will of which they were modifications.

In each of the cases which I have hitherto considered, as well as in the case before me, the earlier codicil in question had a force of its own. It must prevail unless it be revoked by the subsequent codicil. But there is a class of cases closely akin to those I have been considering, but different in this respect, that in them the earlier codicil has no proper vigor of its own, but derives its force, if at all, from the later codicil. The cases of the latter class are not uniform. First in point of date comes *Gordon* v. *Lord Reay*, 5 Sim. 274; there the testator made a charge on real estate by an unattested codicil, and by a subsequent codicil referred to his will by its date, and confirmed his will; and the Vice-Chancellor of England held that the first codicil was a part of the will, that the second codicil was a republication of the will, and consequently of the first codicil which was a part of it. In the case of *Aaron* v. *Aaron*, 3 De G. & Sm. 475, the testator duly made a will; he then made a codicil not duly attested varying the dispositions of his will; he then duly made a second codicil by which he recited that he

had duly made and executed a will and codicil, describing them by their respective dates, and then, after certain modifications in his will, ratified and confirmed his "said will" in all other particulars thereof, saying nothing as to the ratification of his first codicil. The court held that the intention of the second codicil, as collected from the whole of it, was to confirm the first codicil so as to give effect to it as if it had been duly attested by three witnesses. The recital of the first codicil as having been duly executed was a strong circumstance in this decision.

So far the current of authority seems to run smoothly. But in the recent case of *Burton* v. *Newbery*, 1 Ch. D. 234, the present Master of the Rolls took a different view. There the testator made a will before the Wills Act, under which A. and B. took shares of the proceeds of his real estates. By a codicil made after the Wills Act, he devised subsequently acquired realty on the trusts of his will. This codicil was attested by A. and B., who consequently were incapable of taking their shares under the codicil. By a second codicil, described as a codicil to his will dated the 1st of April, 1839, he gave a pecuniary legacy, and said nothing as to his first codicil. In this state of facts the Master of the Rolls held that the second codicil did not operate as a republication of the first. The only reference, he said, was to a will bearing date a certain day, that is, as I understand it, to a described instrument which excludes instruments of subsequent dates. It appears to me that the Master of the Rolls intended by this judgment to decide only that where recourse is had to a subsequent codicil to give vigor to an earlier one, a mere reference to the will by its date will not operate upon the earlier and inoperative codicil so as to set it up, and that he did not intend (as has been argued before me) to lay down that the confirmation of a will referred to by its date would revoke a pre-existing and valid codicil. Accordingly, I find him dissenting from the case of *Gordon* v. *Lord Reay*, but referring without disapproval to the earlier case of *Crosbie* v. *Macdoual.*

The two classes of cases differ essentially. In the one the earlier codicil has a proper force of its own; in the other the earlier codicil must, if left to itself, fail. In the one class the question is, does the later codicil revoke the earlier and operative one; in the other class you inquire, does the later codicil set up the earlier and inoperative one? To the one class of cases the principle applies that a clear disposition is not to be revoked except by clear words; to the other class this principle has no application. *Doe* v. *Hicks*, 8 Bing. 475; *Farrer* v. *St. Catherine's College,* Law Rep. 16 Eq. 19.

I conclude, therefore, that the decision of the Master of the Rolls in *Burton* v. *Newbery* does not touch the case before me, and was not intended to touch the class of cases to which it belongs.

The case of *Crosbie* v. *Macdoual* and the cases which have followed it appear to me to be right in principle. The character of a codicil is very peculiar. Its nature is not substantive but adjective. It is, as Mr. Justice Blackstone describes it (2 Bl. Com. 450, Kerr's ed.),

"a supplement to a will, or an addition made by the testator, and annexed to and to be taken as part of a testament." A reference to the will therefore in itself carries with it a reference to that which is merely a supplement to or annexed to the will itself; and the mere fact that the testator describes the will by a reference to its original date, does not seem to me sufficient to exclude the inference that the will referred to is the will as modified by the codicils.

This peculiar character of codicils is well illustrated by two cases in the ecclesiastical courts. In the case of *Wade* v. *Nazer*, 1 Rob. Ecc. 627, the testator executed first a will and then a codicil and then re-executed his will, and it was held that the re-executed will took effect subject to the codicil, on the ground that it was a part of the will which was so re-executed. In the case of *Upfill* v. *Marshall*, 3 Curt. 636, the testator made a will, then a codicil, altering certain of its dispositions, and then republished his will. It was held that the codicil was not revoked by the republication of the original will, and that for the same reason the codicil was a part of the republished will.

One other argument remains for consideration. According to the construction which I place upon the second codicil, the property expressed to be devised by it passed in sixteen shares in accordance with the will of the testator. I cannot yield to the argument pressed upon me that even if the first codicil was not revoked, the second codicil passed the after-acquired property on the trusts of the original will. If I am right in thus holding, the codicil operated nothing, unless it be held to have restored the original will by revoking the first codicil, in which case it would have had the very material operation of restoring Ellen Love and Stephen Love to their position of legatees. The codicil ought, it may be suggested, to be construed so as to have some effect, and there being no other effect for it, it ought to be so construed as to revoke the first codicil, and thereby admit Ellen Love and Stephen Love to the benefit of the original dispositions intended for them. This argument ought not, I think, to prevail, because it appears to me to be at variance with the expressed intentions of the testatrix. She recites in the codicil the circumstance which induced her to execute it, namely, the purchase of property since the date of her will, and the contract for purchase of other properties. She appears to have thought that this rendered it desirable to execute a codicil to her will, but it is impossible to suppose that if the real object had been to restore Ellen Love and Stephen Love to their original position as legatees, such an intention would not have been hinted at in the recitals which are introduced into the second codicil for the very purpose of explaining its object; I notice the argument, therefore, only for the purpose of rejecting it. The result is, that in my judgment the second codicil was absolutely inoperative. The will and first codicil must take effect with regard to the whole of the real estate of which the testatrix died possessed, whether acquired before or after the date of her original will.

B. *Revival.*

GOODRIGHT d. GLAZIER *v.* GLAZIER.

King's Bench. 1770.

[*Reported* 4 *Burr.* 2512.]

This cause had been tried at the Sussex Assizes: where a verdict had been given for the plaintiff, the heir-at-law to the testator, against the defendant, who was his devisee in two wills.

It now came before this court, upon a motion on the part of the defendant for a new trial; which was opposed by *Mr. Dunning* (*Solicitor-General*), *Mr. Burrell*, and *Mr. Kemp*, on the part of the plaintiff; who argued, that *both* wills were revoked; and consequently their client took as heir-at-law.

The question turned upon the revocation of the *first* will, *by making the second.*

The short of the case was this. The former will (being a will of *lands*) was made in 1757: the second, in 1763. The *former* was *never cancelled:* the *second* was *cancelled by the testator himself.* Both wills were in the testator's custody, at the time of his death: the second, *cancelled;* the first, *uncancelled.*

The counsel for the plaintiff, the heir-at-law, argued That the second will was a complete instrument, at the time when it was executed; that it clearly proved the testator's intention of revoking the former; and that the execution of it was as much a revocation of the former, as if he had thrown the former into the fire; that the preservation of it was merely accidental, and of no consequence; that it had been already totally extinguished, so that it could never revive; that, as it never had been republished, it remained a mere nullity; and that no subsequent event could hinder the execution of the second will from operating as a revocation of the former. The second will was therefore the testator's only subsisting will, so long as it remained uncancelled. And when he thought fit to cancel and destroy it, it is manifest that he meant to die intestate, and that his heir-at-law should take. If a woman makes a will, and then marries, her prior will is thereby revoked; and shall remain so, although she should immediately become a widow. They cited a case of *Ashburnham and Bradshaw;* and also the case *Ex parte Hellier*, 3 Atkyns, 798, where Sir George Lee gave sentence "that the execution of a second will is a revocation of a first, though the second be afterwards cancelled; and that the cancelling the second did not set up the first:" which, they said, was the same point, only that it was personal property. *Mr. Dunning* said, he had inquired

into that case: and it was affirmed by the delegates.[1] They denied the two cases of *Eggleston* v. *Speke*, Carthew, 79, 1 Show. 89, 3 Mod. 259, and *Onions* v. *Tyrer*, 1 P. Wms. 343, to be like the present case. The former is only, "that a second will shall not revoke a first; if the second is not good in law, but void." The latter is, that "a second will, devising lands to the same person, and revoking all former wills; and this second will subscribed by three persons, but not in the testator's presence, shall not revoke the former will, so as to let in the heir-at-law." They insisted, that the Statute of Frauds does not alter any of the old requisites of revocation, except in the cases therein excepted. The same liberality, they said, ought to prevail in the revocation of wills, as in the making of them: and the true principle of the cases upon revocation of wills, both before and since the Statute of Frauds, is the *alteration of the testator's intention.* 1 Rolle's Abr. 614, 615, 616.

Mr. Serjeant Leigh was beginning to speak on the other side; but was prevented by Lord Mansfield, as the case was so plain as to render it unnecessary for the Serjeant to proceed.

His Lordship observed, with regard to the case *Ex parte Hellier* in 3 Atk. 798, that Mr. Atkyns only reports what passed in Chancery. There might be other circumstances appearing to the Ecclesiastical Court, which might amount to a revocation of a will of *personal* estate.

Here, the testator has, by *both* wills, devised the lands in question, *to the defendant.* His cancelling the second is a declaration "that he does not intend *that* to stand as his will." Does not that speak, "that his first will *shall* stand?" If he had intended to revoke the first will, when he made the second, it must have operated as a declaration "that the defendant should *not* take." But that could not be his intention; because he devises to the defendant by *both.*

As to cases of revocation of devises of land, contrary to the intention of the testator (as the case of the Earl of Lincoln, and many more), they turned upon legal subtleties. They have been *determined;* and therefore must govern all similar cases: but none of them are applicable to the present question.

Here the intention of the testator is plain and clear. A will is ambulatory till the death of the testator. If the testator lets it stand till he dies, it is his will: if he does not suffer it to do so, it is *not* his will. Here, he had two. He has cancelled the second: it has no effect, no operation; it is as no will at all, being cancelled before his death. But the former, which was never cancelled, stands as his will.

Mr. Justice Yates concurred with Lord Mansfield, for the same reasons. A will has no operation, till the death of the testator. This second will never operated: it was only intentional. The testator

[1] This is wrong. The case was compromised, and therefore did not come to a hearing in the Court of Delegates. See 1 Phillim. 427, *note.* — Ed.

changed his intention; and cancelled it. If by making the second, the testator intended to revoke the former, yet that revocation was itself revocable: and he has revoked it. In the case of *Onions* v. *Tyrer*, there was no intention to die intestate: and therefore the heir-at-law was not let in. *Hellier's Case* might be rightly determined: there might be *collateral* evidence of an intention to revoke. That was a will of *personal* estate.

By the Statute of Frauds, "No devise in writing of *lands*, tenements or hereditaments, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing, *declaring the same;* or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence and by his directions and consent; but all devises and bequests of lands and tenements shall *remain and continue in force*, until the same be burned, &c.; or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, *declaring the same.*" Now here are none of these circumstances used in what is pretended to be a revocation of this first will. Therefore the *first* will stands good.

Mr. Justice Willes declared the same opinion; and gave the same reasons; particularly repeating the clause in the Statute of Frauds concerning revocations: which showed, he said, that this is no revocation.

Mr. Justice Aston was in Chancery, as one of the Lords Commissioners.

Lord Mansfield mentioned a cause at the delegates, between *Mason* v. *Limbrey;* where the testator, Samuel Mason, had made his will, of his real and personal estate; and properly executed two duplicates of it: one of which duplicates he kept in his own hands; the other he delivered to Mr. Limbrey. A little before his death, he greatly altered and obliterated his own duplicate; and began to write over a new will, but never finished it: nor did he ever apply to Limbrey, to get back his duplicate. Sentence was given for the duplicate of the first will remaining in Mr. Limbrey's hands: for the imperfect sketch of the unfinished second will was no revocation of the first. He did not mean to die intestate. So, in the case now before us; if this second will is *not* the testator's will, it is no revocation of the first: he did not mean to die without any will at all.

The rule for a new trial was made absolute: and it was without payment of costs.[1]

[1] "Those cases depend each on their particular circumstances. The only difference is, whether the presumption lies on the one side or the other. For whether there is a presumed revival, or a presumed revocation; still it is admitted that the presumption, on whichever side it lies, may be repelled by circumstances; and the case would then resolve itself into a question of intention.

"If it were necessary to decide the point, I should hold that it was not the pre-

NEWTON *v.* NEWTON.

COURT OF APPEAL IN CHANCERY IN IRELAND. 1861.

[*Reported* 12 *Ir. Ch.* 118.]

THE LORD CHANCELLOR [BRADY].[1] The petition of appeal in this case was presented by Philip Jocelyn Newton, the heir-at-law of the testator, John Newton, who contends that the decree of the Court of Probate is erroneous, and that that court ought to have pronounced John Newton to have died intestate.

The question depends on the legal position which we should assign to three or four documents; which are, first, a will made by John New-

sumption, when B. was cancelled, that A. should revive." — *Per* SIR JOHN NICHOLL, in *Moore* v. *De La Torre*, 1 Phillim. 375, 400 (1816).

In the argument of the same case before the delegates, *Mr. Warren*, of counsel for the plaintiff, after citing *Goodright* v. *Glazier*, continued thus: —

"In *Harwood* v. *Goodright*, Cowp. 87, 91, Lord Mansfield says, '*it is settled, that if a man by a second will revoked a former, yet, if he keep the first will undestroyed, and afterwards destroy the second, the first will is revived.*' Lord Mansfield, speaking the sense of the court, considers this as a clear established rule at common law. — It stands upon the authority of these two cases."

The following dialogue then ensued: —

"PER CURIAM. MR. JUSTICE ABBOTT. That would go a vast length; — if you put it as an absolute proposition at law without any deduction, that the cancellation of the second will revives the first. — Suppose a man, having a wife and one child, should make a will, leaving his property in a manner suitable to the then state of his family, — that he should afterwards have six children born, and then should make a will, which he should afterwards destroy. By setting up the first will, you would leave five of the children unprovided for. — If you put it as an absolute proposition, that the cancelling of the second will would revive the first, cases might be put so distressing as to make one feel a little whether it was right.

"*Mr. Warren.* Your Lordships will do me the justice to recollect that I have only cited authorities.

"PER CURIAM. MR. JUSTICE ABBOTT. Certainly; and I put the question to you that you may fortify your opinion by reason as well as by authorities, if you can.

"*Mr. Warren.* I presume to go no further than the authority of those cases, which certainly do lay it down as a decided principle of law without limitation.

"PER CURIAM. MR. BARON RICHARDS. But I think I may venture to say it has not been universally so considered. — It is a great misfortune that *dicta* are taken down from judges, perhaps incorrectly, and then cited as absolute propositions.

"*Mr. Warren.* I do not apprehend there can be any mistake in the report: when Lord Mansfield mentions it, he does not say it is decided in such and such a case, but he considers it as a point perfectly established.

"PER CURIAM. MR. JUSTICE ABBOTT. It certainly in the report is put as the settled law, excluding all question of intention.

"*Mr. Warren.* If it is the law, therefore whatever inconvenience may arise from it, it must remain the law, till it is altered by the Legislature, and nothing short of an

[1] The facts are here omitted, and also the opinion of the LORD JUSTICE OF APPEAL BLACKBURNE, concurring with the LORD CHANCELLOR.

ton on the 4th of February, 1858; second, a will of John Newton on the 11th of January, 1859; third, a codicil of the 7th of February, 1859; fourth, a codicil made by the same John Newton on the 16th of February, 1859. These are the four instruments the legal position of which must determine this case.

The facts of the case are few; and, to my apprehension, after very fully considering it, the question is very simple. The will of the 4th of February, 1858, is not now forthcoming. It was destroyed by the testator; and it was found as a fact, by the jury before whom the case was tried, that it had been destroyed before the 16th of February, 1859, that is, before the execution of the codicil of that date. It had been revoked absolutely by an intermediate will, executed on the 24th of April, 1858, which it is only necessary to mention for this purpose, and to which it is not necessary further to allude. The will of the 4th of February, 1858, was absolutely revoked by it, and was in fact destroyed before the 16th of February, 1859. Therefore, if there was nothing else in the case, the decree would be right in affirming that the will of the 11th of February [January], 1859, and the codicil of the 7th of February, 1859, are the last will and testament of John Newton. But we have to consider the effect produced on those three

Act of Parliament could do this; and, even admitting that possible difficulties may apply to this rule of law, this is not that kind of case which would call upon the court to depart from the rule on account of any peculiar hardship." — *Moore* v. *Moore*, 1 Phillim. 406, 419-421 (1817).

"The clear result of all the cases, the common-sense of them, is that it must be ascertained whether it was or was not the intention of the deceased that the will should stand." — *Per* Sir John Nicholl, in *Hooton* v. *Head*, 3 Phillim. 26, 32 (1819).

"Now the legal presumption as to whether, by the destruction of a later will, the revival of a former uncancelled will is to be presumed, is a point that has been much controverted, but never very clearly settled. And perhaps the bare legal presumption upon such a case is not very material to be discussed. In the case of *Glazier and Glazier*, 4 Burrows, 2512, so far as respects the disposition of lands, Lord Mansfield is reported to have said that the former will is revived. But the correctness of that report and the soundness of the doctrine there laid down have been a good deal questioned. In these courts, as applies to wills respecting personalty, the presumption has been rather the other way, and against the revival of the former testament; it has been held that it requires some act to show an intention of such revival. As far as my own opinion goes, I cannot help saying that good sense and the reason of the thing seem rather to favor the presumption as taken in these courts. But the truth is, that in all these matters the legal presumption must grow out of something in evidence before the court; — and in fact a case can hardly by possibility be so destitute of all circumstances as to require a decision upon mere legal presumption, and nothing else. In the case of *Moore and Delatorre*, before the High Court of Delegates, I understand it was clearly held by that court, that whichever way the presumption of revival might be, still the intention was to be collected from all the circumstances of the case." — *Per* Sir John Nicholl, in *Wilson* v. *Wilson*, 3 Phillim. 543, 554 (1821)

"This court is founded in holding, under the sanction of the superior court, that the legal presumption is neither adverse to, nor in favor of, the revival of a former uncancelled, upon the cancellation of a latter, revocatory, will. Having furnished this principle, the law withdraws altogether; and leaves the question, as one of intention purely, and open to a decision, either way, *solely* according to facts and circumstances.

documents by the codicil of the 16th of February, 1859; and for that purpose it is necessary to look to the language of that codicil. It is this — "This is a codicil to the last will and testament of John Newton, of Bagnalstown House, in the county of Carlow, Esq., bearing date on or about the 4th day of February, 1858, and which I desire may be considered as annexed to and be taken as part thereof." It then states that, according to the provisions of that will, his nephew, Philip Charles Newton, in case he (the testator) died without issue of his marriage, would become entitled to his estate and to the residue of his personalty; and it then states the reason which the testator had for being dissatisfied with his nephew, but not to such an extent as to induce him absolutely to revoke the devise and bequest in his favor; and it declares that, in the event of his marrying without his knowledge or his written approbation, he revoked the devise and bequest to him, and, in lieu thereof, he gave him a rent-charge; and the codicil then proceeds to dispose of all the testator's real and personal estate, which in that event it was his desire to take from his legatee and devisee Philip Charles Newton, and to give, subject to the same limitations as in the will, to W. C. Newton, and it concludes thus — "In all other respects I confirm my said will, especially that part of it whereby

This, I conceive, is the true principle to be extracted from the judgment of the Court of Delegates in the case of *Moore* v. *Moore and Metcalf*, 1 Phillim. 375, 466, — a case determined, after an able argument, upon the fullest consideration.

"It is quite unnecessary to inquire what principle would be applicable to a case of this description totally nude of circumstances; as I think it next to impossible that such a case should ever occur. If ever such a case actually does occur, it will be for the court to deal with it, according to the best of its judgment, *pro re nata*. But I can scarcely figure to myself a case either without concomitants; or with these so nicely balanced that neither side prevails. There must always, I think, be circumstances in both scales; and preponderating circumstances either in the one or the other, so as not to leave the case itself, where the law seems to leave it, purely *in equilibrio*." — *Per* Sir John Nicholl, in *Usticke* v. *Bawden*, 2 Add. 116, 125, 126 (1824).

"Where the later of two inconsistent wills was [lost or] cancelled, or otherwise revoked by the testator in his lifetime, the effect of such revocation clearly was, according to the old law, to restore the prior will to its original position; and such restored will, if not revoked by any subsequent act of the testator, came into operation at his decease; and the distinction sometimes suggested, between cancelled wills which did, and those which did not, contain express clauses of revocation, in regard to their revoking effect upon an earlier uncancelled will, was wholly without foundation. The clause of revocation, like every other clause, was ambulatory and silent until the death of the testator called the will into operation. In the ecclesiastical court, however, Sir J. Nicholl laid it down, that the legal presumption was neither adverse to nor in favor of the revival of a former uncancelled, upon the cancellation of a later revocatory, will. The question was, he said, open to decision either way, according to facts and circumstances." — 1 *Jarm. Wills* (*4th ed.*), 136.

In *Neate* v. *Pickard*, 2 Notes of Cases, 406 (1843), a will was altered, then revoked by marriage, and after marriage revived by a codicil. It was *held* by Sir H. Jenner Fust that the will was revived as altered.

Under the Wills Act, 7 Wm. IV. & 1 Vict. *c.* 26, § 22, a will revoked by a later will, and then destroyed, cannot be revived by destruction of the later will. *Major* v. *Williams*, 3 Curt. 432 (1843).

I charge my said estates with the sum of £500 for, and I bequeath the same to, Beauchamp Newton Johnson, and which bequest I hereby repeat and re-affirm."

That codicil is not forthcoming. It was destroyed by the testator, shortly after its execution, and under circumstances which have given rise to some of the questions in the case. But that it was executed, and validly executed as a codicil, no question whatever can be entertained. It was prepared by Mr. Johnson, who was the person with whom was or had been deposited an authentic copy of the will of the 4th of February, 1858. That gentleman retained this copy of the will; he had given the will itself to the testator, and to him the testator went, in order to have prepared the codicil of the 16th of February, 1859.

The first legal position, which seems to me incontrovertible as regards that codicil, is that, by no possible means can the reference made in it to the will of the 4th of February, 1858, be transferred to any other instrument, or (which is the question in the case) be applied to the will of the 11th of January, 1859. I need not read the authorities which have been referred to on this point; it is clear on the facts. I believe, and we all believe, that some great mistake was made in the progress of this transaction, and that Mr. Newton himself thought he was doing one thing when he was really doing another. But the authorities are too strong on the subject; and I must hold, as the court below held, that this codicil of the 16th of February, 1859, belonged exclusively to the will of the 4th of February, 1858, and must be considered as applicable to it, and to it only. The question in the case relates to the effect of it; what is its effect first on the will of the 4th of February, 1858? The judge below held, and I think rightly held, that the operation of this codicil could not be set up as a document governing and regulating the devolution of the property in the will of the 4th of February, 1858; in other words, he would not read the codicil so as to make it and the will together one instrument. The will itself had been destroyed. It was as if it had never existed. It was no longer *in rerum natura*, and could not, therefore, be incorporated with the codicil. That is the foundation of the judgment of the learned judge on this part of the case; and he clearly expresses his opinion that the operation of the codicil of the 16th of February, 1859, whatever other effect it might have, would not be to revive the will of the 4th of February, 1858. But that is not so much the question as what its effect was on the will of the 11th of January, 1859. The learned judge of the court below held, and we concur with him in that respect, that, apart from other considerations, the simple effect of the codicil of the 16th of February, 1859, if it stood in its integrity, was to revoke the will of the 11th of January, 1859, with its codicil of the 7th of February, 1859. The codicil of the 16th of February, 1859, refers to the will of the 4th of February, 1858, in distinct terms, and professes to confirm the words of that will; and whatever may be its

other effect, it plainly declares that, at the time it was executed, the intention of the testator John Newton was, that the will of 1858 should be his will, and, consequently, that the will of 1859 should not be his will. The words of the Lord Justice of Appeal, in his judgment in *Fitzgerald* v. *Sterling*, 6 Ir. Ch. Rep. 210, are peculiarly applicable to this case. Speaking of a deed, he says — "A deed may be completely inoperative to transfer the property bequeathed, and yet be effectual as a revocation; for it is at least an irrevocable declaration of an intention that the legatee shall not take, though it fails from any cause to transfer the subject-matter to another." So here this codicil had the effect, in my apprehension, of declaring the clear intention of John Newton, that the will of the 11th of January, 1859, and its codicil of the 7th of February, 1859, should not be his last disposition of his property — that it should go in a different channel altogether; and he indicates what that was to be, by a reference to the will of February, 1858.

It is said that, though that may be so in the abstract, yet there may be circumstances which would qualify the effect of a revoking codicil, in the way suggested at the bar, and adopted in the judgment of the court below. It was said that the object of the codicil was to set up the will of the 4th of February, 1858, and that the consequent revocation of the will of the 11th of February [January], 1859, was coupled with the condition that the legal operation of the codicil should be to revive the will of the 4th of February, 1858; that the revocation was dependent on that effect, and, if that effect failed, in other words, if the will of the 4th of February, 1858, could not be set up, there was no intention of revoking the will of 1859, and that the will of 1859 was consequently to remain unrevoked, if that which was to be substituted for it failed to take effect; and the learned judge of the court below so held. There is no doubt that certain acts done by a testator, which operate as a revocation or destruction of a will or codicil, may admit of qualification. Cancelling an instrument and destroying it, by burning or otherwise, are acts which depend on the intention with which they are performed; and if they are done under a mistake as to the effect or legal consequence, *e. g.*, where the act is done for the purpose of setting up another instrument, and this other instrument fails in effect, the court will go back to the intention, will qualify the act, and will hold that it was conditional — that it was accomplished for a purpose which has failed, and that it must not have an effect different from and opposed to the intention of the testator. There are many cases in the books to that effect. I shall only refer to one case, *Perrott* v. *Perrott*, 14 East, 440, which I do not presume to quarrel with, in which the cancellation was completed under a mistake of the effect of that act. But the question which we have to consider here is not how far an equivocal act, depending on intention, is to be controlled, but how far a written instrument, expressly declaring the intention of the party executing it, is controllable, or can be controlled, by parol evidence,

in the same way as an act of the testator can be controlled; in other words, whether you can, by parol evidence, engraft upon a written instrument a condition qualifying and making it of no effect, if it should fail in law to carry out the intention of the party. That is a proposition in support of which no authority has been cited. It is, no doubt, laid down that if a man, having made a will in favor of a particular person, forms the belief that that person is dead, and, reciting that fact, makes a new disposition of his property, and it turns out that he was mistaken as to the death of the object of his bounty, the latter disposition is conditional, and of no effect, having been made under a mistake of fact; but, unless the mistake appears on the face of the instrument itself, I know of no case in which it has been held that the effect of the instrument is destroyed; and I find a case in which it was held that the recital in a codicil, not of a fact, but that the legal operation of a former codicil was different (as the testator was advised) from what it really was, would not have the effect of making the latter codicil conditional, and that the court must take the instrument as it stood. The case to which I allude is the case of *The Attorney-General v. Lloyd*, 3 Atk. 551. In that case, a testator made a will, before the Statute of Mortmain, by which he gave particular lands, and his personal estate to be laid out in lands, to charitable uses; and by a codicil, dated the 12th of July, 1756, after the Statute of Mortmain was passed, reciting his will, and the devises of his lands, but that there had been an Act of Parliament entitled the Mortmain Act, and being in doubt whether the devise made by him to such charitable uses would be good or not, and being still desirous, as far as in him lay, to confirm his said will, nevertheless if, by the Act of Parliament, or by any construction of law thereupon, the estate was not well devised, and could not go to those uses, then and in such case he gave those lands to Millington Buckley, and his heirs. By a second codicil, reciting that, being advised that the devise of his lands would be void, and it being his intention that the charity should be continued, and being advised that his personal estate could be given, he gave his personal estate to the charitable uses before mentioned, and he gave his real estate to the defendant, Millington Buckley. It was held that the real estate passed by the second codicil, although the testator was mistaken as to the legal operation of the will. Now suppose John Newton had made a codicil in this way, "Being advised that this codicil will revive my will of the 4th of February, 1858, I hereby revoke my will of the 11th of January, 1859."

I apprehend that, on the authority of *The Attorney-General* v. *Lloyd*, the will of January, 1859, would have been revoked, although the testator was badly advised, and the will of 1858 was not revived. It appears to me that there is a plain distinction between the recital of a fact which turns out to be erroneous, and the recital of advice or opinion, which the testator acts upon. There could be no limit to liti-

gation, if the validity of wills was made to depend on investigations of that character, if the court was to inquire under what advice this will or that codicil was made. We are asked to engraft on this instrument a condition, because the will was made in consequence of erroneous advice given by somebody, or of an erroneous opinion existing in the mind of the testator himself. But we have been referred to no authority for thus construing the codicil. Looking at the case then in that view, we have a testamentary document clearly and distinctly revoking all former wills, and confirming, in express terms, an instrument which the testator meant to incorporate in it. There may have been some mistake; but, on the face of the document, the testator clearly intended to revoke all other wills, except the will of 1858; and there is nothing to control that intention.

I am, therefore, of opinion that the judgment of the court below is erroneous, so far as it declares that the will of January, 1859, was not revoked, — that the effect of the codicil was to revoke that will, and to declare that nothing but the will of 1858, should be the will of the testator; and as that will had been previously destroyed, and could not be incorporated in the codicil, the result is, that we must declare that John Newton died intestate.[1]

The Solicitor-General, *Mr. Brewster*, and *Mr. Charles Shaw*, in support of the appeal.

Mr. Battersby, *Mr. E. Johnston*, *Mr. J. T. Ball*, *Mr. J. E. Walshe*, *Mr. Lloyd*, *Mr. J. A. Byrne*, and *Mr. Litton*, for different parties, *contra*.

JAMES *v.* SHRIMPTON.

PROBATE DIVISION. 1876.

[*Reported* 1 *P. D.* 431.]

SIR J. HANNEN (President).[2] This case was tried before me, and the following facts were proved: On the 12th of October, 1871, the testator duly executed his will, and on the 3d of July, 1872, he married, whereby his will was revoked. On the same day, and after his marriage, he executed a codicil, in which he made a provision for his wife; and the codicil contained a clause to this effect: "In all other respects I revive, ratify, and confirm my said will." Afterwards circumstances occurred by reason of which the provisions of the codicil failed, and it is probable that he then destroyed it. The question for my consideration is, whether the destruction of the codicil upon which

[1] But see *Hale* v. *Tokelove*, 2 Rob. Ecc. 318 (1850); *Rogers* v. *Goodenough*, 2 Sw. & Tr. 342 (1862). Cf. *Goods of Steele*, L. R. 1 P. & D. 575 (1868); and *Goods of Stedham*, 6 P. D. 205 (1881).

[2] Only the opinion is here given.

the revival of the will depended has left the will inoperative. I am of opinion that it was not the intention of the testator to leave the will inoperative, but his idea was, that the will, having been brought into existence again, remained valid notwithstanding the destruction of the codicil. I was asked to grant probate of the will and codicil on the presumption that what the testator had done had not been done *animo revocandi*. Where there has been a physical destruction of a testamentary paper the court has often been called upon to form an opinion as to the intention of a deceased at the time he did the act. In this case I have come to the conclusion that the testator destroyed the codicil with no intention of revoking the will, and that the court should give no more effect to the act than it would do if the testator had destroyed the paper under a mistake as to the instrument he was destroying. It was done under a misconception of the effect of the act; it was not done *animo revocandi*, and I therefore decree probate of the will and codicil.

Dr. Spinks, Q. C., and *C. A. Middleton*, for the plaintiffs.

Searle, for the defendants.

PICKENS *v.* DAVIS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1883.

[*Reported* 134 *Mass.* 252.]

APPEAL from a decree of the Probate Court, allowing the will of Mary Davis. Hearing at May Term, 1881, before *Morton*, J., who reported the case for the consideration of the full court. The facts appear in the opinion.

The case was argued at the bar in October, 1882, and was afterwards submitted on briefs to all the judges.

H. Kingman, for the appellee.

E. Robinson, for the appellant.

C. ALLEN, J. The two questions in this case are, first, whether the cancellation of a will, which was duly executed, and which contained a clause expressly revoking former wills, has the effect, as matter of law, to revive a former will which has not been destroyed, or whether in each instance it is to be regarded as a question of intention, to be collected from all the circumstances of the case; and secondly, if it is to be regarded as a question of intention, whether subsequent oral declarations of the testator are admissible in evidence for the purpose of showing what his intention was. These are open questions in this commonwealth. In *Reid* v. *Borland*, 14 Mass. 208, the second will was invalid, for want of due attestation. In *Laughton* v. *Atkins*, 1 Pick. 535, the second will was adjudged to be null and void, as

having been procured through undue influence and fraud; and the whole decision went upon the ground that it was never valid, and could not be.

The first of these questions has been much discussed, both in England and America; and it has often been said that the courts of common law and the ecclesiastical courts in England are at variance upon it. See 1 Wms. on Executors (5th Am. ed.) 154–156, where the authorities are cited. The doctrine of the ecclesiastical courts was thus stated in 1824 in *Usticke* v. *Bawden*, 2 Add. Ecc. 116, 125: "The legal presumption is neither adverse to, nor in favor of, the revival of a former uncancelled, upon the cancellation of a later, revocatory, will. Having furnished this principle, the law withdraws altogether; and leaves the question, as one of intention purely, and open to a decision, either way, solely according to facts and circumstances." See also *Moore* v. *Moore*, 1 Phillim. 406; *Wilson* v. *Wilson*, 3 Phillim. 543, 554; *Hooton* v. *Head*, 3 Phillim. 26; *Kirkcudbright* v. *Kirkcudbright*, 1 Hagg. Ecc. 325; *Welch* v. *Phillips*, 1 Moore P. C. 299. In Powell on Dev. (ed. of 1827) 527, 528, a distinction is taken between the effect of the cancellation of a second will which contains no express clause revoking former wills, and of a will which contains such a clause; and in respect to the latter it is said that, "If a prior will be made, and then a subsequent one expressly revoking the former, in such case, although the first will be left entire, and the second will afterwards cancelled, yet the better opinion seems to be, that the former is not thereby set up again." Jarman's note questions the soundness of the above doctrine (page 529, *n.*). While this apparent discrepancy in the respective courts remained not fully reconciled, in 1837, the English Statute of Wills was passed, St. 7 Will. IV. & 1 Vict. *c.* 26, § 22 of which provided, that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same." Since the enactment of this Statute, the decisions in all the courts have been uniform, that after the execution of a subsequent will which contained an express revocation, or which by reason of inconsistent provisions amounted to an implied revocation, of a former will, such former will would not be revived by the cancellation or destruction of the later one. *Major* v. *Williams*, 3 Curt. Ecc. 432; *James* v. *Cohen*, 3 Curt. Ecc. 770, 782; *Brown* v. *Brown*, 8 El. & Bl. 876; *Dickinson* v. *Swatman*, 30 L. J. (N. S.) P. & M. 84; *Wood* v. *Wood*, L. R. 1 P. & D. 309. In order to have the effect of revocation, it must of course be made to appear that the later will contained a revocatory clause, or provisions which were inconsistent with the former will; and the mere fact of the execution of a subsequent will, without evidence of its contents, has been considered insufficient to amount to a revocation. *Cutto* v. *Gilbert*, 9 Moore, P. C. 131. See also *Nelson* v. *McGiffert*, 3 Barb. Ch. 158.

In the United States, there is a like discrepancy in the decisions in different States, though the clear preponderance appears to be in favor of a doctrine substantially like that established in the ecclesiastical courts. This rule was established in Connecticut, in 1821, in *James* v. *Marvin*, 3 Conn. 576, where it was held that the revocatory clause in the second will, *proprio vigore*, operated instantaneously to effect a revocation, and that the destruction of the second will did not set up the former one; and the like rule was declared to exist in New York, by the Supreme Court of that State, in 1857, in *Simmons* v. *Simmons*, 26 Barb. 68. The question was greatly considered in Maryland, in 1863, in *Colvin* v. *Warford*, 20 Md. 357, 391, and the court declared that "a clause in a subsequent will, which in terms revokes a previous will, is not only an expression of the purpose to revoke the previous will, but an actual consummation of it, and the revocation is complete and conclusive, without regard to the testamentary provisions of the will containing it." The court further held that the cancellation of a revoking will, *prima facie*, is evidence of an intention to revive the previous will, but the presumption may be rebutted by evidence of the attending circumstances and probable motives of the testator. In *Harwell* v. *Lively*, 30 Ga. 315, in 1860, a similar rule was laid down, and maintained with great force of reasoning. The opinion of the court concludes with the following pertinent suggestion: "It must be conceded there is much law adverse to the doctrine. . . . . Calculated as it is to subserve and enforce the tenor and spirit of our own legislation, and to give to our people the full benefit of the two hundred years' experience of the mother country, as embodied in the late Act, is it not the dictate of wisdom to begin in this State where they have ended in England? We think so." See also *Barksdale* v. *Hopkins*, 23 Ga. 332. The courts of Mississippi, in 1836, and of Michigan, in 1881, adopted the same rule. *Bohanon* v. *Walcot*, 1 How. (Miss.) 336; *Scott* v. *Fink*, 45 Mich. 241. It is to be observed, that some of the foregoing decisions are put expressly on the ground that the later will contained an express clause of revocation. 45 Mich. 246; 20 Md. 392. An examination of the cases decided in Pennsylvania leads us to infer that a similar rule would probably have been adopted in that State, if the question had been directly presented. *Lawson* v. *Morrison*, 2 Dall. 286, 290; *Boudinot* v. *Bradford*, 2 Yeates, 170; s. c. 2 Dall. 266; *Flintham* v. *Bradford*, 10 Penn. St. 82, 85, 92.

On the other hand, in *Taylor* v. *Taylor*, 2 Nott & McC. 482, in 1820, it was held in South Carolina that the earlier will revives upon the cancellation of the later one; and the same rule prevails in New Jersey, as is shown by *Randall* v. *Beatty*, 4 Stew. (N. J.) 643, and cases there cited.

In various States of the Union, Statutes have been enacted substantially to the same effect as the English Statute above cited, showing that wherever, so far as our observation has extended, the subject has been dealt with by legislation, it has been thought wiser and better to

provide that an earlier will shall not be revived by the cancellation of a later one. There are, or have been, such Statutes in New York, Ohio, Indiana, Missouri, Kentucky, California, Arkansas, and Virginia, and probably in other States. Concerning these Statutes of New York, it is said in 4 Kent Com. 532, that they "have essentially changed the law on the subject of these constructive revocations, and rescued it from the hard operation of those technical rules of which we have complained, and placed it on juster and more rational grounds."

On the whole, the question being an open one in this State, a majority of the court has come to the conclusion that the destruction of the second will in the present case would not have the effect to revive the first, in the absence of evidence to show that such was the intention of the testator. The clause of revocation is not necessarily testamentary in its character. It might as well be executed as a separate instrument. The fact that it is inserted in a will does not necessarily show that the testator intended that it should be dependent on the continuance in force of all the other provisions by which his property is disposed of. It is more reasonable and natural to assume that such revocatory clause shows emphatically and conclusively that he has abandoned his former intentions, and substituted therefor a new disposition of his property, which for the present, and unless again modified, shall stand as representing his wishes upon the subject. But when the new plan is in its turn abandoned, and such abandonment is shown by a cancellation of the later will, it by no means follows that his mind reverts to the original scheme. In point of fact, we believe that this would comparatively seldom be found to be true. It is only by an artificial presumption, created originally for the purpose of preventing intestacy, that such a rule of law has ever been held. It does not correctly represent the actual operation of the minds of testators, in the majority of instances. The wisdom which has come from experience, in England and in this country, seems to point the other way. In the absence of any statutory provision to the contrary, we are inclined to the opinion that such intention, if proved to have existed at the time of cancelling the second will, would give to the act of such cancellation the effect of reviving the former will; and that it would be open to prove such intention by parol evidence. Under the Statute of England, and of Virginia, and perhaps of other States, such revival cannot be proved in this manner. *Major* v. *Williams*, and *Dickinson* v. *Swatman*, above cited; *Rudisill* v. *Rodes*, 29 Grat. 147. But this results from the express provision of the Statute.

In the present case, there was no evidence tending to show that the testatrix intended to revive the first will; unless the bare fact that the first will had not been destroyed amounted to such evidence. Under the circumstances stated in the report, little weight should be given to that fact. The will was not in the custody of the testatrix, and the evidence tended strongly to show that she supposed it to have been destroyed.

The question, therefore, is not very important, in this case, whether the subsequent declarations of the testatrix were admissible in evidence for the purpose of showing that she did not intend, by her cancellation of the second will, to revive the first; because, in the absence of any affirmative evidence to prove the existence of such intention, the first will could not be admitted to probate. Nevertheless we have considered the question, and are of opinion that such declarations were admissible for the purpose of showing the intent with which the act was done. The act itself was consistent with an intention to revive, or not to revive, the earlier will. Whether it had the one effect, or the other, depended upon what was in the mind of the testatrix. It would in many instances be more satisfactory to have some decisive declaration made at the very time, and showing clearly the character of the act. Evidence of declarations made at other times is to be received with caution. They may have been made for the very purpose of misleading the hearer as to the disposition which the speaker meant to make of his property. On the other hand, they may have been made under such circumstances as to furnish an entirely satisfactory proof of his real purpose. It is true, that it may not be proper to prove the direct act of cancellation, destruction or revocation in this manner. But when there is other evidence of an act of revocation, and when the question of the revival of an earlier will depends upon the intention of the testator, which is to be gathered from facts and circumstances, his declarations, showing such intention, whether prior, contemporaneous, or subsequent, may be proved in evidence.

In the great case of *Sugden* v. *St. Leonards*, 1 P. D. 154, the question underwent full discussion, in 1876, whether written and oral declarations made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents; and it was decided in the affirmative. It was admitted in the argument, at one stage of the discussion, that such subsequent declarations would be admissible to rebut a presumption of revocation of the will; but, this being afterwards questioned, it was declared and held, on the greatest consideration, not only that these, but also that declarations as to the contents of the will, were admissible. See pages 174, 198, 200, 214, 215, 219, 220, 225, 227, 228, 240, 241. The case of *Keen* v. *Keen*, L. R. 3 P. & D. 105, is to the same effect. See also *Gould* v. *Lakes*, 6 P. D. 1; *Doe* v. *Allen*, 12 A. & E. 451; *Usticke* v. *Bawden*, 2 Add. Ecc. 123; *Welch* v. *Phillips*, 1 Moore P. C. 299; *Whiteley* v. *King*, 10 Jur. (N. S.) 1079; *Re Johnson's Will*, 40 Conn. 587; *Lawyer* v. *Smith*, 8 Mich. 411; *Patterson* v. *Hickey*, 32 Ga. 156; 1 Jarm. Wills (5th Am. ed. by Bigelow), 130, 133, 134, 142, and notes. The question was also discussed, and many cases were cited in *Collagan* v. *Burns*, 57 Maine, 440, but the court was equally divided in opinion. Many, though not all, of the cases, which at first sight may appear to hold the contrary, will be found on examination to hold

merely that the direct fact of revocation cannot be proved by such declarations.

The result is, that, in the opinion of a majority of the court, the will should be disallowed, and the decree of the Probate Court

Reversed.[1]

[1] See *Williams* v. *Williams*, 142 Mass. 515 (1886).

In *James* v. *Marvin*, 3 Conn. 576 (1821), a later will contained a clause expressly revoking an earlier will. It was *held* that the cancellation of the later will did not revive the earlier one. HOSMER, C. J., said: "The implied revocation of a will, by one made subsequently, with different devises and bequests, rests on a different foundation. The revocation effected by *a will* merely, is not instantaneous — but ambulatory, until the death of the testator; for although, by making a second will, the testator intends to revoke the former, yet he may *change* his intentions, at any time before his death (Pow. Dev. 549); and this was the case of *Goodright* d. *Glazier* v. *Glazier*, 4 Burr. 2512. But, a clause of express revocation is something more than a declared intention; it is an act consummated by the execution of the deed or will, in which it is contained, and operating immediately."

After the decision in *James* v. *Marvin*, the Connecticut Legislature passed a Statute, by which it was provided that "no will or codicil shall be revoked, except by burning, cancelling, tearing or obliterating it by the testator, or by some person in his presence, by his direction, or by a later will or codicil."

In 1880, when this later Statute was in force, a testatrix, who had previously made a will, made another will, which was inconsistent with the former, but which contained no express clause of revocation. This will was not found after the death of the testatrix, but the former will was carefully preserved. The Supreme Court of Errors of Connecticut *held* that the former will was revived. Referring to *James* v. *Marvin*, the court says: "In the case cited, the court in fact decided two questions: 1st, that a clause in a will revoking former wills took effect immediately; and 2d, that if the subsequent will contained no such clause, it did not affect former wills until it became operative. The first question was directly before the court, the second was only incidentally involved.

"Now the second question is directly raised, and the first is incidentally involved. In the former case the Statute was not in force; now it is. The Statute comes before us now for the first time for a construction. And it must be remembered that the Statute changes the aspect of the first question. It is not now what it was when *James* v. *Marvin* was decided. Then any written declaration to that effect revoked a will irrespective of any Statute and without regard to the death of the testator. Now the Statute requires that the writing, in order to have that effect, must itself be a will or codicil, and executed with all the formalities required for such instruments. Under the Statute it may be claimed, and the claim sustained by very respectable authorities, and supported by reasoning of considerable force, that the will, even though it contain a clause expressly revoking former wills, must take effect as a will before the revoking clause will be operative."

After saying that the doctrine as to the effect of a revoking clause in a will, laid down by Hosmer, C. J., in *James* v. *Marvin*, has been questioned by Judge Redfield (see 1 Redf. Wills,* 328), and that the weight of authority seems to be in accordance with the latter's views, the court comes to the conclusion that, at any rate where there is no express clause of revocation, the mere making of the second will does not, *ipso facto*, revoke the former will.

CHAPTER VI.

GRANT OF PROBATE AND OF ADMINISTRATION.

Note on the Jurisdiction and Procedure of Courts of Probate.

I.

Courts having Jurisdiction.

In the earliest times the grant of probate and of administration took place, if at all, in the temporal courts. See 1 Thorpe, Anc. Inst. 413, 500 ; *Hensloe's Case*, 9 Co. 36, 38 ; 3 Seld. Op. 1667–1671, 1677, 1678. But the full and (with the exception of a few manorial courts) exclusive jurisdiction of the ecclesiastical courts in these matters was firmly established before the end of the fourteenth century. See Glanv. Lib. 7, *c.* 8 ; Mag. Cart. (John), § 27 ; St. 31 Edw. III. *c.* 11 ; Coote, Ecc. Prac. 21–58 ; 3 Seld. Op. 1678–1681 ; *Dyke* v. *Walford*, 5 Moo. P. C. 434.

The law administered by the ecclesiastical courts is the ecclesiastical law. 1 Thorpe, Anc. Inst. 495. This, at any rate since Henry VIII.'s time, has been the King's Ecclesiastical Law. St. 25 Hen. VIII. *c.* 21 (1533), Preamble. See *Queen* v. *Millis*, 10 Cl. & F. 534, 680 *et seq.* The *substantive testamentary law* seems to be largely of native growth. The contributions taken in England from the Civil Law concerned more the construction than the validity of wills ; and next to nothing was taken in testamentary matters from the Canon Law. The *procedure*, however, in the English ecclesiastical courts was kept closely on the lines of the Canon Law.

The person who has independent jurisdiction in ecclesiastical courts over any territory is *the ordinary*. (He is usually the bishop.) According to the characteristic of the canon law, he can delegate his judicial authority, and generally does so to one who is called variously official principal, chancellor, commissary, or official. 3 Burn, Ecc. Law (9th ed.) 39 ; Co. Lit. 344 *a* ; 2 Inst. 398.

England and Wales were divided into two provinces, Canterbury and York. Canterbury had twenty-two dioceses, and York five. In some, but not all, dioceses, there was one or more archdeaconries.

There were three classes of courts, —

I. Those not exempt from the usual appellate jurisdiction. Here an appeal lay from the Archdeaconry Courts to the Bishops' Courts, which were called Consistory Courts ; from the Consistory Courts to the Provincial Courts of Appeal ; and from the Provincial Courts of Appeal to the Court of Delegates.

The Consistory Courts had not only appellate jurisdiction from the Archdeaconry Courts, but also (concurrently with the Archdeaconry Courts, when any) original jurisdiction. Some bishops also had other courts which had jurisdiction (*semble* not exclusive of the Consistory Courts) over parts only of the diocese. From all the Bishops' Courts an appeal lay to the Provincial Courts of Appeal. In Canterbury the Court of Appeal was called the Court of the Arches, and the judge the Official Principal of the Arches ; in York the Court was called the Chancery Court of York, and the judge the Official Principal.

From the Provincial Courts appeals lay to the Court of Delegates, which took the place of the appeal to Rome. This was a commission named for each case by the king, made up of common law judges, usually three, one from each Superior Court, and of from four to six doctors of the Civil Law. See Rep. Ecc. Com. 6. The court

announced its judgment without giving reasons. If it was equally divided, or if no common law judge was in the majority, commissions of adjunct were issued, until a majority with a common law judge in it was obtained. See 1 Lee, 239–241. Finally a commission of review might be granted, on recommendation of the Lord Chancellor, which was rarely given. See *Mathews* v. *Warner*, 4 Ves. 186. See Rep. Ecc. Com. App. 207–209.

II. The second class of courts included those exempt from the usual jurisdiction. These comprised (1) *Royal Peculiars*, where the appeal lay formerly directly to Rome. Appeal directly to the Delegates. (2) A few *manorial courts*, which still retained the power to grant probate and administration within a manor. Appeal directly to the Delegates. (3) *Peculiars* of deans, sub-deans, prebendaries, vicars, &c. *Parham* v. *Templar*, 3 Phillim. 223. Appeal directly to the Provincial Courts of Appeal. [N. B. There seem to have been some of these peculiars, which were exempt from the archdeacon's jurisdiction, but not from the bishop's.] (4) *Archdeacons' Peculiars.* (5) *Bishop's Peculiars.* (A) In his own diocese, exempt from the Court of the Archdeaconry in which they lay. (B) In another diocese, exempt from the jurisdiction of the bishop of that diocese, and from which appeals lay directly to the Provincial Courts of Appeal. 3 Burn, Ecc. Law, (9th ed.) 94, 95. (6) *Archbishop's Peculiars.* Some of the peculiars of the Archbishop of Canterbury (mainly in and near London) have a common court, called the Canterbury Court of Peculiars. The judge is called the Dean of the Arches; the office has often been held by the Official Principal of the Arches, *vide supra*, and the judge is more commonly known by the former title than the latter.

III. The third class of courts comprised the Prerogative Courts, one in each province. Here wills were proved and administration was granted when the deceased left goods in more than one diocese; *vide infra.* The appeal lay to the Delegates. The Prerogative were purely testamentary courts.

The judges of all ecclesiastical courts could appoint surrogates to sit in their place. The counsel in these courts were called advocates, and had to be doctors of the civil law. They were incorporated into a college, called Doctors' Commons; the proctors corresponded to attorneys.

In 1832 and 1833, by Sts. 2 & 3 Wm. IV. *c.* 92, and 3 & 4 Wm. IV. *c.* 41, the appeal to the Delegates from the ecclesiastical courts was taken away, and an appeal given to the Privy Council, acting through the Judicial Committee; in 1857, all jurisdiction in testamentary matters was taken from the ecclesiastical courts and given to a single Court of Probate, from which an appeal lay to the House of Lords; and the exclusive privilege of advocates and barristers was taken away. Under the Judicature Act "the Probate, Divorce, and Admiralty Division" is one of the Divisions of the High Court of Justice. An appeal lies to the Court of Appeal, and thence to the House of Lords. 36 & 37 Vict. (1873), *c.* 66, §§ 19, 31; 39 & 40 Vict. (1876), *c.* 59, § 3.

The regular series of reports in the ecclesiastical courts begins in 1809, though Lee's Reports contain opinions, generally brief, from 1752–1758, and the Appendix to the second volume has some cases from 1726–1732. There are very few cases in any other Reports before 1809. The cases are almost all in the Prerogative and Arches Courts of Canterbury and the Consistory Court of London. Instances of cases in other courts will be found, 1 Phillim. 201, 287; 2 Phillim. 403; 1 Add. 96, 124, 411; 1 Hag. Ecc. 48; 3 Hag. Ecc. 618, 726; 1 Curt. 447; 2 Curt. 376; 3 Curt, 338; 1 Notes of Cases, 315.

No process lay for the removal of cases from the ecclesiastical courts by *certiorari* or otherwise.

Mandamus lay from the Court of King's Bench to compel the judges of the ecclesiastical courts to grant probate of undisputed wills, or to grant administration according to the Statutes. *Rex* v. *Raines*, 1 Ld. Raym. 361; *Anon.*, 1 Stra. 552; *Rex* v. *Bettesworth*, 2 Stra. 857, 1118; *Smith's Case*, Ib. 891; *The King* v. *Dr. Hay*, 1 W. Bl. 640.

Prohibition was the common process to restrain proceedings in the ecclesiastical courts, usually for exceeding jurisdiction. If prohibition was not granted, a writ called

"a consultation" sent the case back. 1 Wms. Saund. 136–140. Each of the Superior Courts of Common Law could grant a prohibition. In *Gorham* v. *Bishop of Exeter*, a prohibition was sought in vain from the three Superior Common Law Courts in succession. 15 Q. B. 52; 10 C. B. 102; 5 Ex. 630. On the question whether the Privy Council could be prohibited, see *Combe* v. *Edwards*, 3 P. D. 103; *Martin* v. *Mackonochie*, 4 Q. B. D. 697.

In every county of each of the United States there is a tribunal which grants probate and administration. Generally it is a separate court (though sometimes with the same judge as the County Court). Its most common title is Probate Court. In New York, however, it is styled the Surrogate's Court; in New Jersey, the Prerogative Court; in Georgia, the Court of Ordinary; in Pennsylvania and some other States, the Orphans' Court. Sometimes probate and administration are part of the business of the County Court.

An appeal lies, on matters of law, directly or indirectly, to the Supreme (or highest) Court of the State. That court seldom, therefore, has occasion to issue *certiorari*, *mandamus*, or prohibition.

II.

Facts necessary to give Jurisdiction.

The Alleged Testator or Intestate must have died. — See *Joehumsen* v. *Suffolk Savings Bank*, 3 Allen, 87; and many other decisions and *dicta*. The only decision to the contrary, *Roderigas* v. *East River Savings Institution*, 63 N. Y. 460, seems somewhat shaken by *Same* v. *Same*, 76 N. Y. 316. See 1 Woerner, Amer. Law of Adm. 208–211.

Locality. — In England, the ordinary of the locality where a testator or intestate died had jurisdiction to grant probate or administration. But if the deceased had *bona notabilia*, *i. e.*, of the value of £5, within the province but outside the ecclesiastical limit in which he died, only the archbishop in his Prerogative Court had jurisdiction. If it was uncertain whether this last was the case, it was better to take out probate or administration in the Prerogative Court; for the archbishop had jurisdiction over the whole province, and therefore, although if there turned out to be no goods outside of the diocese or other ecclesiastical limit within which the deceased died, a prerogative probate or administration was irregular and voidable, yet it was good until set aside; while, on the other hand, if there were *bona notabilia* outside of the ecclesiastical limit in which the deceased died, probate or administration granted by the bishop or other ordinary was absolutely void.

If there were *bona notabilia* in both provinces, two probates were necessary.

On probate where there were *bona notabilia* in a peculiar, see *Lysons* v. *Barrow*, 2 Bing. N. C. 486; *Easton* v. *Carter*, 5 Exch. 8; and on the disputes between the archbishops and bishops on the question of the archbishop's prerogative, see Coote, Ecc. Prac. 61–86.

Since St. 20 & 21 Vict. c. 77, § 23 (1857), all jurisdiction has been in one court.

In the United States there is much variety in detail, but in general the Probate Court of the county where the deceased last dwelt has jurisdiction; and if the deceased dwelt out of the State, then the Probate Court of the county where he left assets, or, if there are more than one such county, then of that county in which jurisdiction is first taken.

There is great diversity of opinion in the United States on the question whether a grant of probate or administration in a wrong locality is void. See Smith (N. H.), 473, note.

Locality of Debts. — The locality of a simple debt is where the debtor lives, *Casebolt* v. *Casebolt*, Dyer, 305 *a*, *in marg.*; including bills of exchange and promisssory notes, *Yeoman* v. *Bradshaw*, 3 Salk. 164; *Sloeum* v. *Sanford*, 2 Conn. 533; *Chapman* v. *Fish*, 6 Hill, 554. *Contra*, *St. John* v. *Hodges*, 9 Baxt. 334. The locality of a bond debt is where the instrument in fact is. *Gurney* v. *Rawlins*, 2 M. & W. 87; *Eccrs* v. *Shannon*,

73 N. Y. 292. The locality of a judgment debt is where the judgment is recorded. *Daniel* v. *Luker*, Dyer, 305 *a* ; *Adams* v. *Savage*, 2 Ld. Raym. 854. The locality of a lease is where the land lies, Dal. 77 ; of stock, where the stock-book is kept, *Arnold* v. *Arnold*, 62 Ga. 627 ; of the English Funds, in London, *Scarth* v. *Bishop of London*, 1 Hag. Ecc. 625. But see *Wyman* v. *Halstead*, 109 U. S. 654.

III.

Procedure.

Probate is obtained either in common form or in solemn form.

It is obtained *in common* form on production of the instrument, and oath of the executor that he believes it to be the will. This is enough if the instrument is in regular form. But if it is not in regular form (or if, before the Wills Act, it was not attested), affidavits to prove execution are required.

Proof in solemn form, or per testes. — (1) The next of kin or other person interested in denying the validity of the will may enter a *caveat*, and the executor must then prove in solemn form. (2) The executor may *sua sponte* cause the next of kin, &c., to be summoned to come in and attend proof in solemn form. (3) The next of kin or a legatee interested under another will or codicil may after probate in common form cause the executor to be summoned to have the first probate annulled.

When a will is to be proved in solemn form the court directs both parties to file "affidavits of scripts," with all the writings under which they claim appended ; and on the next court day these affidavits are filed. Coote, Ecc. Prac. 471–477.

The plaintiff, who is generally the executor, propounds the will, and then brings in his libel (or, as it is called in testamentary causes, his allegation), which comprises the positions and articles, *i. e.*, the matters to be answered by the defendant and by the witnesses. Langdell, Eq. Pl. §§ 16, 21, 25. This allegation may be opposed, which raises a question of law, the judge deciding whether the allegation is to be admitted, rejected, or reformed. Langdell, § 25. The other party puts in his personal answers under oath to the positions, and witnesses are examined on the articles, and cross-examined on interrogatories ; then the other party puts in his allegation, the positions and articles of which are answered in like manner. When all the allegations are in, and the answers taken, then and then only the evidence is published. 3 Burn, Ecc. Law (9th ed.) 195 ; Langdell, §§ 25–29.

A hearing is had, and then judgment given in the form of an "interlocutory decree having the force and effect of a definitive sentence in writing." This differs from a definitive sentence only in the fact that the latter is signed by the judge, while the former is only a statement of the register. It has the same effect as a definitive sentence, and an appeal lies from it. 3 Burn (9th ed.) 207, 210, 211, 218 ; Coote, 631 *et seq.*

The proceeding in probate cases is now much simplified in England. In several of the United States the distinction between proof in common form (where the will is proved *ex parte*) and proof in solemn form exists. The proof in solemn form is sometimes in the Probate Court, sometimes by appeal to a higher court, sometimes by way of bill in equity to set aside the probate. See 1 Woerner, Amer. Law of Adm. § 215. In other States there is but one kind of proof. A common provision is that if there is no opposition, a will may be proved by one witness. Generally there are no pleadings in the probate courts in this country ; when there are any, they are very simple. Evidence is given orally. When a case is tried by a jury, it is sometimes on an issue of *devisavit vel non*, sometimes as to particulars of competency or undue influence.

A lost will may be admitted to probate on proof of its contents on the evidence of one, and he an interested witness. *Sugden* v. *St. Leonards*, 1 P. D. 154. But see *Woodward* v. *Goulstone*, 11 Ap. Cas. 469.

In a few cases courts have stricken scandalous matter out of the probate, but they do so with hesitation and reluctance. See *Goods of Wartnaby*, 1 Rob. Ecc. 423 ;

Marsh v. *Marsh*, 1 Sw. & Tr. 528, 536 ; *Curtis* v. *Curtis*, 3 Add. 33 ; *Goods of Honywood*, L. R. 2 P. & D. 251.

In England a copy of the will with a certificate, and called a probate, is given to the executor. It is the sole evidence of his appointment. In the United States letters testamentary are generally issued to the executors, and the wills are recorded.

On including in the probate papers referred to in the will, see *Newton* v. *Seaman's Friend Soc.*, 130 Mass. 91, and cases cited. But see 1 Redf. on Wills, *267, *note* (41).

SECTION I.

APPOINTMENT OF EXECUTORS.

HILLS *v.* MILLS.

KING'S BENCH. 1691.

[*Reported* 1 *Salk.* 36.]

A PROHIBITION was prayed and granted to the Ecclesiastical Court of Canterbury, to stay a suit there, to repeal or revoke the probate of a will, because the executor was become bankrupt, and to grant administration to another. And though one *Coates's Case* was cited, where an administration was revoked for that cause, yet the court said that differed ; for the executor is constituted by the testator himself, and by him intrusted ; but it seemed to be agreed, that if an executor become *non compos*, the spiritual court may commit administration, because that is a natural disability.[1]

REX *v.* RAINES.

KING'S BENCH. 1698.

[*Reported* 1 *Ld. Raym.* 361.]

A MANDAMUS was directed to Sir Richard Raines, to command him to grant probate of the will of Edith Pinfold to one Richard Watts, who was made executor of it. Sir Richard Raines makes return to it, and admits that Edith Pinfold made her will, and Watts executor of it ; but says further, *quod luculenter et judicialiter fuit probatum, et constat* to him, that Watts is worth nothing, but absconds for debt ; and therefore that it is lawful to him to defer the granting of the probate until Watts find sufficient security to perform the intent of the will.

Sir Bartholomew Shower, *Mr. Montague*, and *Dr. Waller*, *Advocate-General*, against the *mandamus*.

Mr. Northey and *Mr. Eyre*, for the *mandamus*.

[1] See *Evans* v. *Tyler*, 2 Rob. Ecc. 123 (1849).

Per Holt, C. J. Wills and testaments are of ecclesiastical connusance, not by force of the civil or canon laws (for they bind no farther here than as they have been received here), but by the law of the land. Then if the ecclesiastical courts proceed to enlarge the power of the judge, contrary to that which the common law allows, the King's Bench will prevent all sorts of encroachments. As if an executor be sued in the ecclesiastical courts to make distribution, he not being residuary legatee; though that were allowed by the canon law, yet the King's Bench would grant a prohibition to stay any such suit; for all suits for distribution were prohibited by the King's Bench until the 22 & 23 Car. 2, *c.* 10, made them lawful. Dr. Waller has not quoted any canon law, that the ordinary in such case ought to take caution; and the common law will not permit him to exact security for the insolvency of the executor. For suppose in this case (as the fact is) the executor will not give security, and yet will not renounce the executorship; the ordinary cannot compel him to give security. What must be done? Though the refusal of the oath amounts to a refusal of the office of executor (because the oath is allowed by the common law, for it is proper to take a promissory oath, that he will execute the office justly which he is going to execute), yet the refusal to give security will not amount to a refusal of the office of executor; because it is against common right to require collateral security. Then the testament will continue in force, the ordinary cannot grant administration *cum testamento annexo*, and so there will be a failure of justice, nobody being capable to sue the testator's creditors. One half of what one finds in Linwood is not the law of the land. And as to the case of religious persons, objected out of Linwood, he said, that if a monk may be made an executor, he cannot accept the office without leave of his superior; and then if the superior gives him leave to be executor, without giving other collateral security, the superior, by his leave given, is become security; and if the monk commits a *devastavit*, the suit shall be against the abbot and the monk, and the execution will be of the goods of the house. And Turton, Justice, agreed with Holt, Chief Justice, *in omnibus*. But Rokeby, Justice, seemed to be of opinion, that the grievance in the present case would be properly remedied by appeal. And he said, that in the province of York security was always given upon the granting of the probate of a will, without any dispute made about it. Upon which a day was given to Dr. Waller to certify the King's Bench, by producing precedents, whether the practice had been in the Prerogative Court to take caution in such case. At which day no precedent of it being shown, nor satisfaction thereof given to the court, Holt, Chief Justice, with the concurrence of the other judges, pronounced the opinion of the court, that a peremptory *mandamus* ought to be granted in this case; because the ecclesiastical court cannot require caution in this case. 1. For when a man is made executor, nobody can add qualifications to him, other than those which the testator has imposed; but he shall be who, and in what manner, the testator shall judge

proper. 2. The executor has a temporal right, of which he is barred by the refusal of the probate, inasmuch as he cannot before probate sue in Westminster Hall. 3. There are no precedents in the canon law to warrant this, and the practice has been always contrary. And if any cases happen, in which equity may be requisite, there is another channel here, where it runs without resorting to the spiritual court, viz., chancery.[1]

A peremptory *mandamus* was granted. And note, Mr. Robert Eyre told me, that the Lord Chancellor Somers well approved this resolution.

Note. — Duncamban *v.* Stint, 1 Ch. Cas. 121 (1669). — The defendant's testator gave the plaintiff £1,000, to be paid at the age of twenty-one years.

The bill suggested the defendant wasted the estate, and prayed he might give security to pay this legacy when due; and the Master of the Rolls [Sir Harbottle Grimstone] did accordingly decree the defendant to give security.

Hathornthwaite *v.* Russel, 2 Atk. 126 (1740). — A motion for a receiver to be appointed by this court to collect in the money standing out upon several securities, and the rest of the assets of a testator, on a suggestion that the will was obtained by fraud, and that the sanity of the testator is now likewise contesting in the ecclesiastical court (see *Montgomery* v. *Clark*, 2 Atk. 378); affidavits, too, on the part of the motion were produced to show the mean circumstances of the two executors, and the counsel relied much upon the case of *Powis* v. *Andrews*, 2 Bro. Par. Ca. 476, where, upon a like motion, a receiver was appointed.

Lord Chancellor [Hardwicke] denied the motion, and distinguished it from the case of *Powis and Andrews:* there the fraud appeared very strong; the executors, too, were not related to the testator, took out a probate the very morning he died, and that very afternoon wasted and embezzled large sums of money which they got into their hands.

But here it is widely different; there are very strong affidavits produced on the part of the defendants to prove the sanity of the testator, and no circumstances to show that the executors used any unjust means, or prevailed upon the weakness of the testator, to make his will in their favor; besides, upon the very face of it, it is a rational will, for he gives away his estate in legacies to seven of his nearest relations, and has preferred the executors, who are as near of kin to him as the plaintiff himself, by making them residuary legatees.

Nor are there any grounds to grant this motion upon the other suggestions of the executors not being responsible, from their indigent circumstances; the court never esteems this as any ingredient to take the assets out of the hands and care of the executors, nor will even the ecclesiastical court refuse persons a probate because they are not of affluent fortunes, as long as the testator himself has placed this confidence in them without regarding their circumstances; besides, too, this case is materially different from *Powis and Andrews* in another respect; there is no probate here, so that, as the bulk of the testator's estate is placed out upon securities, the executors are not entitled to sue or bring any actions for them; this application, too, is not till a year after the commencement of the suit in the ecclesiastical court; for these reasons his Lordship denied the motion.

Langley *v.* Hawk, 5 Madd. 46 (1820). — *Mr. Heald* moved for a receiver, and that the defendant, an executor and trustee, who had become bankrupt, might pay into court a sum of money acknowledged to be in his hands.

Mr. Rose, contra, stated, that proceedings had been taken to supersede the commission, which would probably be superseded, and that the defendant had more than

[1] The Court of Chancery did accordingly, on a bill filed, restrain Watts from intermeddling until he should have given security. s. c. Carth. 457, 458.

SECTION II.

ACCEPTANCE, RENUNCIATION, AND TRANSMISSION OF EXECUTORSHIP.

ANONYMOUS.

COMMON PLEAS. 1481.

[*Reported Year Book*, 21 *Edw. IV.* 23, *pl.* 8.]

DEBT brought by an executor of an executor in London on an obligation made to the first testator by the Earl of Kent.

Catesby [for the defendant], said that the first testator made him to whom the plaintiff alleges himself to be executor, and one J. B., fishmonger, his executors in London, by the same will; which said B. survived the other executor, and made A., his wife, executrix. And the said A. took to husband Sir William Monteforde, who are both in life, which matter, &c.

BRIAN, C. J. "You say more than is necessary, for it is enough to say that the first testator made J. B., and the other his executors, and that J. B. survived; and the rest is against your advantage." And he did not say why.

sufficient for the payment of his debts; and that the testator knew a commission was issued against the defendant.

Mr. Heald, in reply. The will was made before the commission issued.

THE VICE-CHANCELLOR. [SIR JOHN LEACH.] The question simply is, Whether it is fit the court should now interfere for the protection of this property? Its interference can prejudice no right. I must consider bankruptcy, notwithstanding the petition to supersede, as evidence of insolvency; and from the will being made long before the commission, though not altered afterwards, I cannot satisfactorily infer, that this testator had a deliberate intention to intrust the management of his estate to an insolvent executor. I think it fit that a receiver should be appointed.

NOTE. — On executors by the tenor, or executors by implication, see *Pemberton* v. *Cony*, Cro. El. 164 (1589); *Naylor* v. *Stainsby*, 2 Lee, 54 (1754); *Boddicott* v. *Dalzeel*, Ib. 294 (1756); *Grant* v. *Leslie*, 3 Phillim. 116 (1819); *Goods of Fry*, 1 Hag. Ecc. 80 (1827); *Goods of Oliphant*, 1 Sw. & Tr. 525 (1860); *Goods of Jones*, 2 Sw. & Tr. 155 (1861); *Goods of Baylis*, L. R. 1 P. & D. 21 (1865); *Goods of Punchard*, L. R. 2 P. & D. 369 (1872).

On the appointment of executors by substitution or nomination, see *Goods of Lighton*, 1 Hag. Ecc. 235 (1828); *Goods of Cringan*, Ib. 548 (1828); *Goods of Deichman*, 3 Curt. 123 (1842); *Hartnell* v. *Wendell*, 60 N. Y. 346 (1875).

An executorship may be subject to a condition, *Alice Frances' Case*, Dyer, 3 *b. in marg.* (1581); may be limited in time, *Pemberton* v. *Cony*, Cro. El. 164 (1589); may be limited as to place, *Goods of Wallich*, 3 Sw. & Tr. 423 (1864); *Velho* v. *Leite*, Ib. 456 (1864); *Goods of Astor*, 1 P. D. 150 (1876). As to whether one can be an executor for a particular chattel or class or classes of chattels, see *Anon.*, Dyer, 3 *b.* (1528); *Austre* v. *Audley*, 1 Roll. Ab. 914 (1620); *Rose* v. *Bartlett*, Cro. Car. 292, 293 (1633); *Owen* v. *Owen*, 1 Atk. 494, 495 (1738).

And then *Catesby* prayed to be advised of the parish and ward.

And on another day it was shown for the plaintiff that the plaintiff's testator proved the will before the ordinary, and the said J. B. refused to prove it, whereby his testator administered alone the goods of the deceased, &c.

Collow [for the plaintiff]. "It seems to me that when J. B. refuses to prove the said testament before the ordinary, he will be estopped to administer afterwards, and he will not be charged by way of action as executor, wherefore it seems to me that the action is now maintainable as brought."

The Justices. "If twenty are named executors, and one proves the will, it is enough for them all, if the others will agree to it. And the refusal before the ordinary is no estoppel against them from administering afterwards when they please, in our law, and we have regard in this not to the law of Holy Church; and the other who proves the testament ought strictly [*de fine force*] to name those who refuse before the ordinary in every action to collect a debt of the testator's, and they can sue with him, or they can be sued. And so although they never administer, their release will be a bar for the entire debt, and so it is clear that he who did not prove the testament, will have the action by survivorship, and that the plaintiff will be barred." And they also said that if A. makes B. [executor, and B.] proves the will and dies, the ordinary will sequester the goods of the said A. as well as the goods of B., for it is now as if the said A. had died intestate at the beginning. And so if the other executor who refused before the ordinary does not wish to administer, the ordinary can sequester.

Sulyard. *Reddendo singula singulis*, the first testator died intestate when his executor would not administer; the ordinary then could sequester and commit the administration to whomever he pleased.

And the opinion of all was that the plaintiff would be barred, notwithstanding the refusal of the other, &c. *Vide* 25 E. III. *c.* 5; *De purveyors*, 29 E. III. *c. ult.*[1]

[1] *Goods of Smith*, 3 Curt. 31 (1842), *accord.*

"And the court took this difference, when many are named executors, and some of them refuse, and some of them prove the will, those who refuse may afterwards at their pleasure administer, notwithstanding this refusal before the ordinary; but if all refuse before the ordinary, and the ordinary commits administration to another, then they cannot afterwards administer." — *Hensloe's Case*, 9 Co. 36 *b*, 37 *a* (1600).

But see *Anon*, Dyer, 160 *b*, pl. 42 (1558.)

But it has been determined on great consideration, that if one of two executors renounces, it is not necessary to cite him in on the death of the other executor, before appointing an administrator *cum testamento annexo*. The renunciation is considered as continuing after the death of the other executor, unless withdrawn. *Harrison* v. *Harrison*, 1 Rob. Ecc. 406 (1846); *Venables* v. *East India Co.*, 2 Ex. 633 (1848.)

ISTED *v.* STANLEY.

1580.

[*Reported Dyer*, 372 *a*, *pl.* 8.]

WHERE the executor dies before the proving of the will, his executor cannot take upon himself the execution of the first will; but administration of the goods of the first testator, with the will annexed to it, is to be committed to the executor of the executor, if the residue of the goods of the first testator (the legacies performed) were bequeathed by his last will to the first executor; or to such other person or persons to whom the said residue is bequeathed; otherwise to the next of blood to the first testator, demanding it. And this (*ex relatione Doctoris Drury*, judge of the Prerogative Court of Canterbury) is the usage and custom of the said court, and agreeable to law (as seemed to him); to which the court gave credit.

BROKER *v.* CHARTER.

COMMON PLEAS. 1587.

[*Reported Cro. El.* 92.]

TRESPASS. It was found by verdict, that Sir Ralph Rowlet being possessed of a term, did make his will, and thereof did make Bacon the Lord Keeper, Catlin Chief-Justice, and others, his executors, and devised the term to Lord Catlin, and died. All the executors writ a letter to Dr. Dale, judge of the Prerogative Court, that they could not attend the execution of the will, and desired him to commit the administration to Henry Goodyer, the next of kin to the testator; and the administration was accordingly granted: but the register entered the cause, for that the executors did defer *suscipere onus testamenti*. After this, Catlin entered upon the land devised to him, and granted it over. The doubt was, If this grant was good? First, if the letter be a sufficient renunciation? Secondly, If they once refuse, if they, after administration granted, may administer at their pleasure? Dr. Ford declared to the justices, that by the civil law, a renouncing may be as well by matter in fact as by a judicial act, and they may refuse by *parol;* and cited a rule in the civil law, *Non vult esse hæres, qui ad alium vult transferre hæreditatem;* and, *Hæreditas est totum jus quod defunctus habuit.* And to the second matter he said, *Qui semel repudiaverit hæreditatem, amplius hæreditatem petere non potest;* and, *Qui semel repudiaverit* shall not after be executor, *quia transit in contractum;* and that executors cannot refuse for one time, but forever; but they may pray time to advise of taking upon them the executorship,

and it ought to be granted; and in that case the ordinary is to grant in the mean time letters *ad colligendum*, &c., but is not to grant administration. And for these reasons there being a refusal, the grant made after administration committed, was void; and so was the opinion of the court.

WICKENDEN *v.* THOMAS.

Common Pleas. 1611.

[*Reported* 2 *Brownl.* 58.]

The case was this: Two executors were jointly made in a will; one of them releases a debt due to the testator, and after, before the ordinary, refuses to administer; and it was agreed by all the justices that the release was administration, and for that he hath made his election, and then the refusal comes too late, and so is void.

ANONYMOUS.

King's Bench. 1675.

[*Reported Freem. K. B.* 288.]

B. devises a legacy to C., and makes D. his executor, and dies: D. makes E., an infant, his executor, and dies, and administration is committed to F. *durante minore ætate* of E. C., the legatee, sues F. in the spiritual court for his legacy; and F. moves for a prohibition: but the court denied it; for although an administrator of an executor is not an administrator to the first testator, yet an administrator *durante minore ætate* is *loco executoris*, and may be sued, as the executor of an executor may.[1]

PARTEN *v.* BASEDEN.

Common Pleas. 1676.

[*Reported* 1 *Mod.* 213.]

Parten brought an action of debt, in this court, against the testator of Baseden, the now defendant; and had judgment; after whose death, there was *a devastavit* returned against the defendant, Baseden, his

[1] Contra, *Limmer* v. *Every*, Cro. El. 211, as cited by Lord C. B. Gilbert in Bac. Ab. Executors, (B) 1 [2 vol. p. 381, 5th edit.]; but that case hardly supports him; and in Leonard's report of the same case under the name of *Limver* v. *Evoric*, 4 Leon. 58, it is said only that such an administrator should sue as administrator of the first testator. s. c. cited Godolphin's Orph. Leg. p. 89; and see *Norton* v. *Molineux*, Hob. 246. — Smirke's Note.

executor: he appeared to it, and pleaded; and a special verdict was found to this effect: —

The defendant, Baseden, was made executor by his will, and dwelt in the same house in which the testator lived and died; and before probate of the will he possessed himself of the goods of the testator, prized them, inventoried them, and sold part of them, and paid a debt, and converted the value of the residue to his own use; afterwards, before the ordinary, he refused, and upon his refusal, administration was committed to the widow of the deceased.

The question was, Whether or no the defendant should be charged to the value of the whole personal estate, or only for as much as he converted?

Barrell, Serjt., for the plaintiff.

The Court was of opinion, that the committing of administration, in this case, is a mere void act. A great inconvenience would ensue, if men were allowed to administer as far as they would themselves, and then to set up a beggarly administrator; they would pay themselves their own debts, and deliver the residue of the estate to one that is worth nothing, and cheat the rest of the creditors. If an administrator bring an action, it is a good plea to say, That the executor made by the will has administered. Accordingly judgment was given for the plaintiff.[1]

GOODS OF THORNTON.

Prerogative Court of Canterbury. 1826.

[*Reported* 3 *Add.* 273.]

William Thornton, the party deceased in this cause, died in the year 1822; having made his will, and thereof appointed George Dodd and Charles Parsons, executors. In the month of October, 1822, administration, with the will annexed, issued to Margaret Thornton,

[1] "The Lord Chancellor [Redesdale] observed, that some of these old cases could scarcely be supported on principle; they were decided whilst a great jealousy of the ecclesiastical court prevailed. That the meaning of the modern determinations was, that an administration granted after an executor having acted *in pais* might be repealed by an application to the ecclesiastical court; not that it was a mere nullity, unless as a protection to the executor. That it was true, an executor having acted, could not discharge himself from liability by such an administration being granted to another: but that a debtor to the fund could not in answer to a suit by such administrator, set up the act *in pais* of the executor against his renunciation, in order to delay or prevent a recovery by the administrator. That the administration was void, only as a protection to the executor, but in no other sense." — *Doyle* v. *Blake*, 2 Sch. & L. 231, 237 (1804).

In *Doyle* v. *Blake*, *ubi sup.*, and *Rogers* v. *Frank*, 1 Y. & J. 409 (1827), it was *held* that an executor who had intermeddled with the estate, and had afterwards renounced, was liable to the legatees in equity as executor.

On what constitutes intermeddling, see *Long* v. *Symes*, 3 Hag. Ecc. 771 (1832).

widow, as the residuary legatee for life named in the will, on the renunciation of the said executors; and she was lately dead, leaving effects of the deceased unadministered. Mr. Parsons, one of the executors, upon this, retracted his renunciation; and the court was now moved by counsel, to admit this retractation, and to decree probate of the will of the deceased to Mr. Parsons, as one of his executors.

In support of the motion it was submitted, that an executor, after a renunciation, and probate *or administration* granted, had still a right to probate whenever a vacancy occurred in the representation of the deceased. After a *probate* granted, this was said to be recognized by the practice of the office, which was in the constant habit of permitting one of several executors who had renounced, after the death of his co-executors who had proved the will, to retract that renunciation, and to take probate, as a matter of course. It was now contended, on the authority of a passage in Mr. Toller's Law of Executors (vol. 1, *c.* 3 § 1), that the same right accrued to an executor, after *administration, with a will annexed*, granted, although the office, it was said, had objected to this, on the ground of the *possible* inconvenience that might accrue, in other quarters, from chains of executorship once broken, being thus suffered to revive. Should this deceased, for instance, it was objected by the office, have been the surviving executor of other testators, and should administrations have been granted of *their* effects, on the renunciation of *his* executors, if the chain of executorship were to revive, as now proposed, there would be double and conflicting representations of such testators; the one by grant of administration, as above; the other, by the revived chain of executorship.

The Court was of opinion, upon this state of facts, that the objection raised by the office was a valid objection — and there being, so far as appeared, no instance of, or precedent for, a grant of this description in the office, declined acceding to the motion.

It was then prayed, that *administration with the will annexed* might issue to Mr. Parsons, the executor; by which means the objection raised by the office would be obviated. This would preclude, it was said, a revived chain of executorship, and, consequently, the occurrence of the inconvenience suggested by the office; and still give the representation to the executor, who was submitted to be entitled to it. But,

Per Curiam, Parsons is not the residuary legatee — the wife was residuary legatee for life only; and there is *no* residuary legatee substituted. Under these circumstances, as the next of kin are before the court, praying the administration, they have, clearly, I think, a preferable title to it.

Motion refused.

GOODS OF PERRY.

PREROGATIVE COURT OF CANTERBURY. 1840.

[*Reported* 2 *Curt.* 655.]

THIS was an application on behalf of the executor of an executor, to be allowed to renounce the probate of the will of the first testator, before taking probate of the will of the second testator. According to the ordinary practice of the office, the executor of an executor becomes, on taking probate of his will, the executor of the first testator.

Nicholl, in support of the motion.

SIR HERBERT JENNER. It has been for many years the practice in this court, that an executor, taking probate of the will of an executor, becomes executor of the will of the first testator, and is not permitted to renounce probate of the first will, and take probate of the second. I am not aware of any instance of departure from this rule, and unless there be some clear principle or authority, the general rule of practice must be observed.[1]

Motion rejected.

SECTION III.

EXECUTOR DE SON TORT.

STOKES *v.* PORTER.

COMMON PLEAS. 1559.

[*Reported Dyer*, 166 *b.*]

STOKES brought an action of debt on bond against Porter as executor of the will of one H. Wyrral; the defendant pleaded *ne unques executor*, *ne unques administer come executor*, &c. The plaintiff averred that he administered as executor divers goods of the said H. W. &c., upon which issue was joined, and the jury found this special verdict, viz. "that the said H. W. at the time of his death was possessed of

[1] "There may, perhaps, be no case which expressly decides that an executor of a testator cannot renounce the executorship of other persons of whom his testator may have been executor, but I can remember that when I was at the bar the question was often raised, and the notion was always scouted. The principle is very plain that a person cannot accept one part of the duties of an executor, and refuse the rest. And if no case has been reported, it must be because every one thought the point too clear to be worth reporting." — *Per* LORD ROMILLY, M. R., in *Brooke* v. *Haymes*, L. R. 6 Eq. 25, 30 (1868).

Cf. *Hayton* v. *Wolfe*, Cro. Jac. 614 (1621); 1 Wms. Exec. (8th ed.) 280.

divers parcels of goods and chattels, and showed what in certain, and the value, as of his proper goods, and that after his death the defendant received of one I. D. seven pounds of a debt which he owed to the said H. W. in his lifetime, for which he made him an acquittance; and that also the defendant, after the death, and before the writ purchased, took and had in his hands all and singular the goods and chattels aforesaid, and the said seven pounds used, occupied, and disposed of at his will and pleasure to his own advantage and profit. And whether this use, occupation, and disposition be an administration in law, the jury pray the advice of the court, &c. and if it be, then they find that the defendant administered as executor, and assess damages and costs, &c." And it was debated at bar and at bench; and it seemed to us three, *s.* H. Browne, A. Browne, and Me, that it is sufficient administration. And first, the definition of the word administration is, an ordering, making, or a disposition, and more properly applied to an officer. And for a ground of the same argument I intend, that by occupation or possession, the goods of the dead give notice of the person who shall be charged as administering, be he ordinary or executor, and draw the charge to him, as debt against the dean only, guardian of the spiritualities during the vacancy of the fee, *ad cujus manus bona intestatoris devenerunt*, without the chapter, 17 E. 3 [Fitz. Ab. Tit. Bre. 822], T. 16 E. 2 [fol. 490], where the *devenerunt* was the issue. And see the Register, fol. 141, and 35 H. 6 [42 pl. 4], against the abbot of Saint Albans to whose hands, &c. and against one executor only, who had possession of the goods, the action well lies, &c. And in M. [T.] 8 E. 3 [52 b, pl. 42] in dower against one executor only who had the sole guardianship, it names him guardian and not executor; and that possession charges one as executor *de son tort demesne*, see 5 E. 4, in the Long Report, fol. 72, and 9 E. 4 [33 a, pl. 7], in debt against the executors, and 35 H. 6, fol. 42, by Moyle, and 50 E. 3, fol. 7 [b, pl. 15], and 33 H. 6 [31 b, pl. 5], where the wife took more of her apparel than was fitting for her degree without legacy or license, and it was holden an executorship *de son tort demesne*. And yet some possession is colorable, and still none in law to charge, &c. as expenses about the funeral;[1] one made coadjutor or overseer; one who has *literas ad colligendum*;[2] a man who is made executor by a will, which will afterwards is disproved by the proving of one later; and a feme covert made executrix who does not intermeddle, &c. and renounces after the death of her husband: and all those cases where a man has color by any authority and law to intermeddle, he may plead the special matter, *sans ceo* that he administered in any other manner, &c. But where he claims title or interest in the goods as by gift of the testator in his life, he shall not say *sans ceo* that he administered any other goods or in any other manner, but *absq. hoc quoad ut executor*, 9 E. 4 [33 a, pl. 7], 10 H. 7, fol. 28 [b, pl. 19]. Also the plaintiff

[1] See *Camden* v. *Fletcher*, 4 M. & W. 378 (1838). — Ed.

[2] See *Anon*, Dyer, 256 *a* (1566). — Ed.

would be without remedy for his debt if he should not have the action above. And if a lawful executor mal-administer, *s.* by converting the goods to his own use, he shall be charged and shall be an executor by tort, and without authority by such malfeasance in many cases to avoid the charge would be unreasonable: and suppose the defendant himself in pleading had confessed the matter above found by the verdict *sans ceo* that he administered in any other manner, would he not be condemned? *Credo quod sic, &c.* And the receipt of the debt above is plainly a thing done as executor, for by no other color could he demand it; wherefore, &c. And afterwards before the next term, the defendant died before judgment given, wherefore the whole matter fell. But CATLYN, SAUNDERS, WHIDDON, and WRAY, were of opinion with the three judges above. H. 15, of the present Queen [Dyer, 225 b, pl. 8]; but MANWOOD, *e contra*.[1]

STAMFORD'S CASE.

COMMON PLEAS. 1574.

[*Reported* 2 *Leon.* 223.]

THE case was, A. took a wife, and afterwards married Elizabeth Stamford, living his first wife, and by deed gave part of his goods to the said Elizabeth; and as to the residue of his goods, being but of small value, he made the said Elizabeth his executrix, and died; she refused the executorship, for which the ordinary committed administration to B. *Gawdy*, Serjeant, asked the advice of the court, against whom the action of debt should lie? for, if the creditor impleadeth the administrator, he hath not *assets;* if the executrix herself, she will plead that she hath renounced the executorship, and that administration is committed to B. And the opinion of DYER, Justice, was, That the gift is void by the common law, and also by the Statute of 13 Eliz., and then, if the gift be void any way, the creditor may have an action of debt against the said Elizabeth as executor of her own wrong: And see that such a gift is void by the common law, 43 E. 3, 2. And by MANWOOD, Justice, He who takes the goods of the dead, shall not be charged as executor of his own wrong, unless he doth something as executor: as to pay debts, make acquittances, &c. See 41 E. 3, 31; 32 H. 6, 7. DYER, If one takes the goods of the dead, and converteth them to his own use, he is chargeable as executor, and so it hath been adjudged in the time of this Queen, in the case of one *Stokes*, which was affirmed by *Bendloes and Harper*. See now Co. 2, Part 53,

[1] See *Bacon* v. *Parker*, 12 Conn. 212 (1837); *Taylor* v. *Moore*, 47 Conn. 278 (1879). The executor *de son tort* of A.'s executor is executor *de son tort* of A. *Meyrick* v. *Anderson*, 14 Q. B. 719 (1850).

Reade's Case; where no lawful executor, or administrator is, there, if a stranger takes the goods of the dead into his possession, the same is a good administration to charge him as executor of his own wrong.

BRADBURY *v.* REYNEL.

COMMON PLEAS. 1597.

[*Reported Cro. El.* 565.]

DEBT against him as executor of Tyrrel. The defendant pleads that Tyrrel died intestate, and that certain of his goods came to the defendant's hands, and afterwards administration was committed to J. S. to whom he had delivered the said goods. — PER CURIAM. It is not any plea; for if the administration had been committed to him, it would not have purged the first *tort*. So here, although administration is committed to a stranger, in regard that he hath once made himself chargeable to the plaintiff's action, as being executor *de son tort*, &c., he shall never afterwards discharge himself by matter *ex post facto*. Wherefore, &c. — *Adjournatur.* — *Et vide* 21 Hen. 6, pl. 1; 8, 9 Edw. 4, pl. 47; 2 Rich. 3, pl. 20.[1]

READ'S CASE.

COMMON PLEAS. 1604.

[*Reported* 5 *Co.* 67.]

READ brought an action of debt against Carter executor of Yong, which plea began in the Common Pleas, Hil. 44 Eliz. Rot. 401. The jurors found, that the said Yong made his testament and last will, and made one A. his executor; and the day of his death was possessed of goods above the value of the debt in demand, and died; and before the will was proved the defendant took the testator's goods into his possession, and intermeddled with them; and afterwards, and before the writ

[1] "If, indeed, previously to an action brought against the defendants as executors *de son tort*, they had paid the money over to the rightful administrator, that would have been a good defence; because then they would have applied the money properly." — *Per* BULLER, J., in *Padget* v. *Priest*, 2 T. R. 97, 100 (1787).

See *Anon.*, 1 Salk. 313, p. 467, note, *post*; *Curtis* v. *Vernon*, p. 469, *post*; 2 H. Bl. 18 (1792).

So if an executor *de son tort* can prove a settled account with the rightful representative, before suit, it is a defence to a bill in equity for an account. So *held* by *Wood*, V. C., in *Hill* v. *Curtis*, L. R. 1 Eq. 90 (1865). And on the jurisdiction of equity over suits against executors *de son tort*, see *Coote* v. *Whittington*, L. R. 16 Eq. 534 (1873); *Rowsell* v. *Morris*, L. R. 17 Eq. 20 (1873); *In re Lovett*, 3 Ch. D. 198 (1876).

purchased, the will was proved; and if on this matter the defendant should be charged as executor of his own wrong was the question. And on great deliberation judgment was given for the plaintiff. And in this case these points were resolved.

1. When a man dies intestate, and a stranger takes the intestate's goods and uses them, or sells them, in that case it makes him executor of his own wrong. For although the pleading in such case be, that he was never executor, nor ever administered as executor; and therefore it was objected, that he ought to pay debt or legacy, or do something as executor: yet it was resolved, and well agreed, that when no one takes upon him to be executor nor any hath taken letters of administration there, the using of the goods of the deceased by any one, or the taking of them into his possession, which is the office of an executor or administrator, is a good administration to charge them as executors of their wrong; for those to whom the deceased was indebted in such case have not any other against whom they can have an action for recovery of their debts.

2. When an executor is made, and he proves the will, or takes upon him the charge of the will, and administers in that case, if a stranger takes any of the goods, and, claiming them for his proper goods, uses and disposes of them as his own goods, that doth not make him in construction of law an executor of his wrong, because there is another executor of right whom he may charge, and these goods which are in such case taken out of his possession after that he hath administered, are assets in his hand: but although there be an executor who administers yet if the stranger takes the goods, and claiming to be executor, pays debts, and receives debts, or pays legacies, and intermeddles as executor, there, for such administration as executor, he may be charged as executor of his own wrong, although there be another executor of right; and therewith agreeth 9 E. 4, 13.

3. In the case at bar, when the defendant takes the goods before the rightful executor hath taken upon him, or proved the will, in this case he may be charged as executor of his own wrong, for the rightful executor shall not be charged but with the goods which come to his hands after he takes upon him the charge of the will. Note, reader, these resolutions, and the reason of them, and by them you will better understand your books, which otherwise seem *prima facie* to disagree. 41 E. 3, 13 b; 50 Ed. 3, 9; 6 H. 4, 3 a; 11 H. 4, 83 b, 84 a; 13 H. 4, 4 b; 8 H. 6, 35 b; 19 H. 6, 14 b; 21 H. 6, 26 & 27; 32 H. 6, 7 a; 33 H. 6, 21; 21 E. 4, 5 a; 20 H. 7, 5 a; 26 H. 8, 7 b, 8 a; 1 Eliz. Dyer, 166; 9 Eliz. Dyer, 255. And so the *quære* in 1 *Mariæ* Dyer, 105, 203, well resolved.[1]

[1] Anonymous, 1 Salk. 313 (1702). — *Per* Holt, C. J. If H. gets goods of an intestate into his hands after administration is actually granted, it does not make him executor of his own wrong; but if he gets the goods into his hands before, though administration be granted afterwards, yet he remains chargeable as a wrongful executor, unless he delivers the goods over to the administrator before the action brought, and then he may

ALEXANDER *v.* LANE.

King's Bench. 1608.

[*Reported Yelv.* 137.]

Alexander brought debt on a bond of £40 against Lane as executor of P. The defendant pleaded, that P. in his lifetime was indebted to him in £40 just debt, and that goods to the value of £10 came to the defendant's hands, which he retained towards the satisfaction of his own debt; and averred, that *nulla bona plura* above goods to the value of £10 came to the defendant's hands to be administered, &c. The plaintiff replied, and showed that the defendant is executor *de son tort* to P. *et quod habet multa alia bona* of P. *administrand. apud* S. in the same county of Norfolk, and concluded, *et hoc paratus est verificare*, &c. The defendant rejoined, and demanded judgment, if the plaintiff should be received to say, that the defendant is executor *de son tort;* forasmuch as by the declaration he has affirmed him to be *executor testamenti;* and thereupon the plaintiff demurred in law. And as to the matter in law the whole court was with the plaintiff; for he may well reply, that the defendant is executor *de son tort*, notwithstanding the declaration; for there is no other form of declaration, as it is adjudged in *Coulter's Case*, 5 Rep. fol. 30. But per tot. Cur. the whole plea is discontinued; for the defendant having pleaded as to goods to the value of £10, which he retained for a debt, and that he had not *plura bona administrand.*, that is an offer of a good issue; then when the plaintiff replies, that he has *plura bona*, &c., and concludes *et hoc paratus est verificare*, it is not good; for he ought to have said, *et hoc petit quod inquirat. per patriam;* for now there is a surplusage of goods denied by the defendant, and urged by the plaintiff, which ought to come in issue, but cannot by reason of the ill conclusion. But in the same term between West plaintiff, and Lane defendant, where West demanded but £4 debt against Lane as executor, *ut supra;* and all the residue of the plea was, *ut supra*, judgment was given for the plaintiff, because the defendant had confessed goods in his hands to the value of £10, which is more than the debt demanded; and therefore forasmuch as by judgment in law an executor *de son tort* cannot retain to pay himself, although the other proceedings in the plea are ill, yet all that is out of the case, and judgment shall be given on the defendant's confession, and so it was. *Quod nota.* Yelverton of counsel *pro querente.*[1]

plead *plene administravit*. *Vide* 5 Co. 33 b, F. N. B. 44. But if he takes upon him to act as executor, he is chargeable to all events.

But see *Hall* v. *Elliot*, Peake, 86, 87 (1791).

One who wrongfully intermeddles after the death of the lawful executor or administrator is an executor *de son tort*. *Cottle* v. *Aldrich*, 4 M. & S. 175 (1815); *Williams* v. *Heales*, L. R. 9 C. P. 177 (1874). But see *Tomlin* v. *Beck*, T. & R. 438 (1823).

[1] See *Prince* v. *Rowson*, 1 Mod. 208 (1675).

VAUGHAN *v.* BROWNE.

King's Bench. 1739.

[*Reported* 2 *Stra.* 1106.]

The defendant is sued as executor; and pleads a judgment to himself in the life of the deceased, and a retainer; the plaintiff replies, that he was executor only *de son tort:* and the defendant, by way of plea *puis darrein continuance* rejoins, that he has since obtained letters of administration. And upon demurrer it was objected, that this is to abate the plaintiff's writ, which was well brought by matter subsequent not depending on any act of the plaintiff's: and that the rejoinder was a departure from the plea. But the Court held, it was well enough; for the first plea does not say there was a will, and the defendant could not at that time do otherwise than admit an acting as executor. And they said it would be very hard to lay it down, that if a man who sues for administration is opposed, and the cause runs out into any length, that the acting *pendente lite* should be construed such a wrongful executorship, as can never be purged, so as to give him the benefit of retaining: besides these pleas *puis darrein continuance* begin with a *relicta verificatione* of the former, which shows it may be departed from. The defendant had judgment.[1]

CURTIS *v.* VERNON.

King's Bench. 1790.

[*Reported* 3 *T. R.* 587.]

Case on promises by the testator. Pleas, First, *Ne unques* executor. Secondly, *Plene administravit.* Thirdly, that Palmer died intestate, and that the defendant never was executor, nor ever possessed any of his goods, save as executor of his own wrong; that after Palmer's death, and before the 14th of May, 1789, administration was granted to his widow, S. Palmer; and that on the 15th of May, 1789, the defendant delivered over to the administratrix all the goods, &c., belonging to the intestate which came to his hands. Fourthly, that the defendant never was executor, &c., save as executor of his own wrong; that administration was granted to S. Palmer (as before); that the defendant recovered £3000 on a bond in this court in the

[1] So *Andrew* v. *Gallison*, 15 Mass. 325, *n.* (1818). But see *Whitehead* v. *Sampson*, 1 Freem. 265 (1679).

intestate's lifetime; that no goods or effects of the intestate ever came into the defendant's possession, except goods of the value of £794 13*s.* 9*d.*, which are not sufficient to satisfy his said debts; and that the administratrix on the 15th of May, 1789, assented to his retaining those goods in satisfaction of his debt.

To the two last pleas there was a general demurrer, and joinder in demurrer.

Wigley, for the demurrer.

Wood, *contra*.

Lord Kenyon, C. J., said, They had looked into the authorities which were cited on the part of the defendant, but that they did not establish the propositions for which they were adduced. The case in 1 Sid. 76, is reported in a confused manner; but it concludes with saying, "that an executor *de son tort* cannot pay himself." Now that goes the length of deciding the present case. And indeed the cases cited from Freem., Yelv., Moor, Mod., and Strange, all prove the same point, that an executor *de son tort* cannot retain for his own debt. They also take the distinction between such an executor and an executor *de son tort* afterwards legalizing his own wrong by taking out letters of administration. The case in Strange shows this matter very clearly; where the court said it would be extremely hard that, if a person, entitled to administration, is opposed in the ecclesiastical court, and does any acts *pendente lite* to make himself executor *de son tort*, those acts should not be purged by his afterwards obtaining letters of administration. And they added that the granting administration legalizes those acts which were tortious at the time. With respect to the first point in this case, the opinion of Lord Chief Justice Holt in Salk. 313, is decisive; where he says, "If H. get the goods of an intestate into his hands, and administration be granted afterwards, yet he remains chargeable as a wrongful executor, *unless he deliver the goods over to the administrator before the action is brought*, and then he may plead *plene administravit*." From all the authorities it is clear, first, that an executor *de son tort* must deliver over the goods of the intestate to the rightful administrator *before* an action is brought against him; and secondly, that, though he be a creditor of a superior nature, he cannot retain in satisfaction of his own debt. Therefore we are of opinion that both these pleas are bad; and consequently there must be

Judgment for the plaintiffs.[1]

[1] Judgment was affirmed in the Exchequer Chamber, 2 H. Bl. 18 (1792).

FLEMINGS *v.* JARRAT.

NISI PRIUS. 1795.

[*Reported* 1 *Esp.* 335.]

ASSUMPSIT for goods sold and delivered to the defendants.

Plea of, 1st, *Ne unques executor*. 2d, No assets come to the hands of the defendants.

The case in evidence was, that Peat the deceased, in his lifetime, being the owner of a certain ship, and having occasion for sails for her, they had been furnished by the plaintiff, who was a sail-maker, and they were not paid for at the time of his death; that after the death of Peat, the defendant had possessed himself of the ship, on which he claimed a lien; and the object of the action was to charge him for the price of the sails, as executor *de son tort*.

The delivery and price of the sails was proved.

Mingay, for the defendant, stated his defence to be, that every interference of a person with the effects of a person deceased would not make him executor *de son tort*, provided it was such interference as was consistent with a legal right of possession, which he claimed; that as to the possession of the ship on the present occasion, the defendant had been the ship's husband, and had taken possession of the ship by virtue of a *bona fide* assignment made to him by Peat, the deceased, in his lifetime.

He then gave in evidence the instrument by which the defendant was appointed the ship's husband. He afterwards proved, that the captain, having possessed himself of the ship, in Peat's lifetime, a suit had been instituted in the Admiralty by Peat, at the defendant's expense, to recover her; and in consideration of that and many other engagements, the defendant was then under on account of the ship, and of £250 paid, Peat had by his deed dated 24th September, 1791, assigned the ship to the defendant.

On this evidence, LORD KENYON said, he was of opinion, that the plaintiff had made out a *prima facie* legal title to the possession as he claimed it, sufficient to exempt him from being charged as executor *de son tort*.

Erskine, for the plaintiff, insisted that the mere proof of the deed of assignment was not sufficient, as he ought to show a completely legal title. That Lord Hawksbury's Act having made an indorsement of the grand bill of sale necessary, such ought to be shown.

LORD KENYON said, that in a question of the nature of the present, he would not inquire whether the plaintiff had conformed to all the requisites necessary to complete his title; that if the defendant came to the possession by color of a legal title, though he had not made out

such title completely in every respect, he should not be deemed an executor *de son tort.*

The plaintiff had a verdict.

Erskine, *Gibbs* and *Baldwin*, for the plaintiff.

Mingay and *Reader*, for the defendant.

Vide Read's Case, 5 Co. 33; *Anon.*, Salk. 313.

MOUNTFORD *v.* GIBSON.

King's Bench. 1804.

[*Reported* 4 *East*, 441.]

In trover for a quantity of iron, tried at the last assizes for Stafford before *Lawrence*, J., the case was opened by the plaintiff's counsel to be that the goods in question had been originally sold by the defendant to the intestate in his lifetime; that on his death, they not having been paid for, on application to the intestate's widow for that purpose, she delivered them back to the defendant in satisfaction of his demand. No other acts were stated to have been done by the widow to show that she had before taken upon herself to act as executrix; but on this statement the defendant's counsel contended, that she having, by this intermeddling with the intestate's effects, made herself executrix *de son tort*, and as the defendant's was a just debt, which the rightful administrator would have been bound to have paid, the defendant had a right to protect himself in this action under such payment by the executrix *de son tort;* for which they cited the *dictum* in *Parker* v. *Kett*, 1 Ld. Raym. 661, that a legal act done by executor *de son tort* will bind the rightful executor. On the other hand was cited *Locksmith* v. *Creswel*, 2 Rol. Abr. 399, tit. Relation, pl. 1, as a case in point. The learned judge thought the plaintiff was entitled to recover; but gave the defendant leave to move to set aside the verdict and enter a nonsuit, if the court thought his direction wrong. A rule *nisi* for that purpose was accordingly obtained in Michaelmas Term last, against which

Williams, Serjeant, and *Wigley* were now to have shown cause; but the court required the counsel for the defendant to sustain their rule.

Milles and *Jervis*, in support of the rule.

Lord Ellenborough, C. J. I am not inclined to dispute most of the propositions which have been advanced in the argument, but the answer to them is, that they have no application to the only question in this case. For when it is said that all payments which are made by an executor *de son tort* in a due course of administration shall be allowed, that may be conceded; but a single act of wrong in taking

the goods of the intestate, though it may be sufficient to make the party an executor *de son tort* with respect to creditors who may choose to sue him in that character, yet will not give him any right to retain them as against the lawful administrator. And the only evidence before the court, that the widow of the intestate acted in the character of executrix *de son tort*, is this single act of wrong in which the defendant participated. I take the principle to have been clearly established by Lord Holt in the case of *Whitehall* v. *Squire*, in Carth. 104, which appears to have been much considered. That was a case where the plaintiff, having received a horse belonging to the intestate from the defendant in remuneration of services performed at the request of the defendant about the funeral of the intestate, afterwards administered to the intestate, and brought trover against the defendant for the value of the horse so received by himself before he became administrator. By Lord Holt's opinion, the plaintiff should have recovered; and he never intimated that the delivery being made by one acting as executor *de son tort* would be a bar to an action by the rightful administrator; and the other two judges who differed from him in the conclusion never questioned the right of the administrator to maintain such an action in general; but they held that the plaintiff, being a *particeps criminis* in the very act he complained of, should not be permitted to recover upon it against the person with whom he had colluded. But there is no intimation of a difference of opinion upon any other point of Lord Holt's judgment. If this defence could be maintained the whole system of administration of an intestate's effects would be put an end to, and instead thereof an authorized scramble introduced by law among the creditors for priority of payment, where the assets were insufficient; and such as had no chance of payment in the regular course of administration would by underhand means plant a beggar in the intestate's house, and under color of his being thus made an executor *de son tort*, would obtain a delivery from him of the goods with which they had respectively furnished the intestate. It may be said that such a transaction might be impeached on the ground of fraud; but if a creditor could thus acquire a title to the intestate's property by the naked act of delivery by another, it would be very difficult in many cases to prove that such delivery had been made in collusion with the creditor who received the goods. Without disputing, therefore, the authority of any of the cases which have been referred to, it is sufficient to observe, that when it is laid down generally that payments made in the due course of administration by one who is executor *de son tort* are good, that must be understood of cases where such payments were made by one who is proved to have been acting at the time in the character of executor, and not of a mere solitary act of wrong in the very instance complained of, by one taking upon himself to hand over the goods of the intestate to a creditor. If it were necessary, it might be fit to consider whether in any case such a delivery of the intestate's goods to a creditor, by one who had no lawful authority, would be a bar to an action of trover by

the rightful administrator: in trespass it is only said that such payments, if made by executor *de son tort* in a due course of administration, shall be recouped in damages. The passage cited from Mr. Justice Buller's *Nisi Prius* does indeed go the length of saying, that if the payments made by executor *de son tort* amount to the full value of the goods sought to be recovered in the action of trover, the plaintiff shall be nonsuited: but the passage in Carthew, referred to in the margin, is directly contrary to that position. And a difference may easily be conceived between an action by a creditor against one who has intermeddled, and whom he sues in the character of *executor* generally, which may estop the plaintiff from saying that the defendant is not lawful executor, and an action by the lawful administrator against such intermeddler, to disaffirm all his acts, and where the defendant is to justify or defend himself under the character of an executor *de son tort*. An act, therefore, may be well sufficient to charge the party himself as executor *de son tort*, which would not be sufficient to justify a wrong-doer claiming title under it. Here no possession of the intestate's goods was proved in the widow before the moment of delivery. For aught appears there might have been no other act of her intermeddling or assuming to act as executrix. Then, without any antecedent possession proved, could she, by the mere act of seizing the goods, give to the creditor all the effect of a delivery by the legal administrator? I find no principle nor authority in the law which will warrant that. The whole argument has been founded on an assumption, not warranted by the facts of the case before us, namely, the antecedent possession of the intestate's property by the widow.

Grose, J. The question is, Whether the simple act of delivering these goods by the widow to the creditor of the intestate will so far make her an executrix *de son tort*, as against the lawful administrator, as to enable the creditor to protect himself under such delivery in an action of trover for the goods brought by the administrator? *Read's Case*, 5 Rep. 33, seems to go the length of saying, that a stranger taking any of the intestate's goods and using or disposing of them, will make him an executor *de son tort:* for though, says Lord Coke, it was objected that he ought to pay a debt or legacy, *or do something as executor*, yet it was resolved and well agreed, that where no one takes upon himself to be executor, nor hath taken letters of administration, there the using of the goods of the deceased by any one, or the taking of them into his possession, which is the office of an executor or administrator, is *a good administration to charge him* as executor of his own wrong. For, he adds, that those to whom the deceased was indebted in such case have not any other against whom they can have an action for the recovery of their debts. Now this may be well, if taken only to charge the party so intermeddling; but if applied to protect payments made by him, it will be necessary to engraft on such disposing, &c., that it be done *in a course of administration*. For

without that qualification, if any servant in the house of the deceased were to deliver goods to a creditor, the creditor might set up a right to retain them from the lawful executor, by saying that this was a delivery from one who was executor *de son tort;* although in no other instance affecting to act as executor. And it would be no answer to the lawful executor to tell him that he had his remedy over against a beggar. It would be most absurd and unjust if such a defence could be admitted. Therefore what is laid down in 5 Rep. must be taken with the qualification I have mentioned. But there is no pretence here for saying that the delivery of the goods in question was in the due course of administration. The only act of administering by the widow, as stated, was the act of delivering these very goods. But to entitle a party to defend his possession against the lawful administrator, under a delivery by an executor *de son tort*, it must have been made at least in the course of administration: and it was incumbent upon the defendant insisting upon it to prove that it was so made in this instance. That was not done, and therefore the facts of the case do not bear out the argument.

Lawrence, J. Upon the opening of the plaintiff's case at the trial by his counsel, and the objection taken upon it by the counsel for the defendant, I understood that all the facts of the case had been stated which gave rise to the question of law: and I did not understand then that there were any other acts of intermeddling by the intestate's widow than the act complained of. But it was insisted that upon these facts (which he again reported as before stated) a title was conveyed to the creditor who took the goods upon the delivery of one who, by such intermeddling, had made herself executrix *de son tort.* This being the state of the case at the trial, I was not led at the time, nor did it then occur to me, to consider what effect the proof of other acts of administration by the widow would have had upon the question; I only gave my opinion upon the facts now before the court; and upon these I think that the delivery of the goods by the widow can convey no title to the defendant. The cases which have occurred, where payments by an executor *de son tort* have been recognized in actions brought against him by the rightful executor, have gone upon this ground, that the payments which were to be recouped in damages were such as the rightful executor or administrator would have been bound to have made; and therefore it could not be considered as any detriment to him that they were made by the executor *de son tort.* But the only foundation on which a creditor of the intestate can in any case make title to a payment or delivery to him out of the intestate's property by an executor *de son tort* is that he had fair reason for supposing that the person from whom he received such payment or delivery had a right to make it; as where such person avowedly took upon him the character of executor, and acted as such. But nothing of that sort was shown here; no other previous act of administration by the widow. It was therefore contended at the trial, and so it appeared to me, that

the defendant had, by thus taking the intestate's goods, made himself executor *de son tort* as much as the widow from whom he received them; for he concurred with her in the same wrongful act. It is indeed said that the opinion given by Lord Holt, in *Parker* v. *Kett*, goes to show that a single act of intermeddling and making payment to a creditor out of the intestate's effects may be good as a payment by an executor *de son tort*. But I do not think that that general conclusion is to be drawn from what is said by Lord Holt. I do not mean to say that a single act of intermeddling may not be sufficient for that purpose, if it be such as may induce the creditor to think that the party so intermeddling was the rightful executor. But I do not think that his meaning is to be carried further; for the words are "creditors are not bound to seek further than him who acts as executor" (1 Ld. Ray. 661); but a man must have acted in some way or other as executor before another can look to him as such. "And therefore" (he instances) "if *an executor de son tort* pay £100 of the testator's in a bag to a creditor, the rightful executor shall not have trover and conversion against the creditor." Lord Holt does not say, if *any person* pay the £100, but if *an executor de son tort* pay it; that is, one who, as he had just before described, had *acted as executor;* one from whom the creditor might suppose that he had a right to claim payment. It has been also argued, that if this action had been brought against the widow, charging her as executrix *de son tort*, she would have been entitled to recoup this payment in damages. I doubt that. However, I give no opinion upon it: but only wish to be understood as not being prepared to give my assent to it at present. When that question arises, it may be material to consider several authorities in the books. *Graysbrook* v. *Fox*, Plowd. 275. That was detinue brought by an executor against the defendant, who had purchased goods belonging to the testator from one to whom the ordinary had, immediately after the testator's death and before the executor had proved the will, granted administration: and it was holden that the executor who sued after probate obtained should recover. Now that was a much stronger case than this; because there the vendee had bought from the person who had actually taken out letters of administration at the time, though they were afterwards avoided upon the production of the will. And it was there said by Walsh, one of the judges, who held with the plaintiff, that "if the defendant had averred that the administrator had alienated the goods to him for a certain sum, and had employed the money in discharge of the funeral, or of the debts of the deceased, or about other things which an executor should be forced to do, there the sale for such purposes should not be avoided, but should remain indefeasible: and the reason is, because by the commission of the administration to him by the ordinary, who was ignorant of the testament, he has *a color of authority*, though it is not a rightful one; and he that has the right *suffers no disadvantage*, although he be bound by the act of the administrator; for it is no more than he himself was compellable to do,

&c. And so, inasmuch as the administrator was compellable to do it, &c., it is reasonable, and no detriment to any one, that the thing done should remain stable and firm without impeachment." Now here there was no *color of authority* proved in the widow, which is one of the reasons assigned why dispositions of the intestate's property by one who is not rightful executor or administrator shall in any case be deemed good; and the other reason is, that he who has the right *suffers no disadvantage*, being no more than *what he himself was compellable to do*. But neither does that appear in this case; for supposing there was not a sufficiency of assets, the administrator would have had a right to prefer himself; and if he would not have been bound to have done what the widow did, it cannot be said that he has *suffered no disadvantage*. So Wentworth's Office of Executor, 182, speaking of payments to be allowed to executors *de son tort*, says, "they must, as he thinks, be understood with this difference, viz., that this payment shall stand as against other creditors, but not as against the right executor or administrator; for then a stranger might usurp the office of executor, and take from him that liberty of election to prefer which creditor he will in the first payment: you might take from the executor power to pay himself before others, in case there were a debt due to him, which were very unreasonable." So here, for aught appeared, the delivery of these goods might take from the plaintiff, the lawful administrator, the power of paying himself his own debt. And this is confirmed by what is said in 2 Blac. Com. 507, 508, that "in all actions by creditors against an officious intruder he shall be named an *executor* generally; for the most obvious conclusion which strangers can form from his conduct is, *that he hath a will of the deceased wherein he is named executor*, but hath not yet taken probate thereof. Then, after saying that he is chargeable with the debts of the deceased, &c., he proceeds: "And though as against the rightful executor or administrator he cannot plead such payment, yet it shall be allowed him in mitigation of damages, *unless*, *perhaps*, *upon a deficiency of assets*, *whereby the rightful executor may be prevented from satisfying his own debt*." Now, I cannot reconcile all these authorities with the general doctrine contended for, that any payment made to a creditor by one who is executor *de son tort* shall be good against the lawful administrator. That doctrine is, I think, very questionable. But it is sufficient to say here that it did not appear that the widow had taken upon herself the administration of the intestate's effects in any other respect than in the single act of wrong complained of.

Le Blanc, J. The case which appeared at the trial was, that this was an action of trover brought by the administrator to recover from the defendant the value of certain goods of the intestate, which the defendant had received after the intestate's death from his widow, who had at the time no title to them, nor any appearance or color of title. To this state of the case the authorities cited by the defendant's counsel have no application; and the *dicta* principally relied on must be

taken with reference to the cases then under consideration, in which view they may be perfectly true, however doubtful taken generally. Some of the cases establish this point, that one who has intermeddled with the goods of an intestate, and is afterwards sued as executor *de son tort*, shall be permitted to protect himself to the extent of such payments out of the intestate's effects as he has rightfully made; by which I understand such payments as he would have been bound to make if he had been rightful executor. The cases have also gone further, and decided that a creditor of the intestate, who has received payment from one who appeared to be acting as rightful executor, might protect himself under such payment: with this distinction, however, that where a person has intermeddled wrongfully, by which he has made himself what is called an executor *de son tort*, when he is sued as executor. there, inasmuch as the law obliges him to pay the demands of all the creditors of the intestate who may sue him, to the extent of the goods come to his hands; so, on the other hand, the law allows that where he was bound to pay other creditors he may defend himself in an action against the rightful executor or administrator for all payments which he was bound to make. But this is a very different case: if it had appeared here that the defendant had received the goods from a person from whom he was in a condition to have enforced payment by law, by showing that she was executrix *de son tort*, he might have brought himself within some of the authorities which have been cited: but there was no evidence of her being executrix *de son tort* at the time, but the very act of wrong complained of in the delivery of these goods; and that is the only act now set up as giving title to the defendant. But that act of wrong of the widow, connected as it was with the defendant's own act of receiving the goods, shall never be set up as giving title in itself against the rightful administrator. At the time of the delivery the widow had not holden out to the world any visible act to show that she had a right to make such delivery to the defendant.

Rule discharged.[1]

OXENHAM *v.* CLAPP.

King's Bench. 1831.

[*Reported* 2 *B. & Ad.* 309.]

Declaration by an attorney, for work and labor, against the defendant, as the executrix of Francis Hunt Clapp. There were counts on promises by the deceased testator, and by the defendant as executrix. Plea, an outstanding bond, dated the 10th of March, 1793, conditioned

[1] See *Buckley* v. *Barber*, 6 Exch. 164 (1851).

for the payment of £600 by G. Clapp and Francis Hunt Clapp to one Locke; that Locke died; that one Mary Blake, the wife of Malachi Blake, was his executrix, and that the bond was unpaid at the death of Francis Hunt Clapp; that after the exhibiting of the plaintiff's bill, and whilst the defendant had leave to imparl to the same, to wit, on 27th of December, 1824, the defendant paid the amount of the bond to Malachi Blake and Mary his wife; and that the defendant had fully administered all the goods and chattels of Francis Hunt Clapp, except goods to the value of £270, which were not sufficient to satisfy the sum of £600. Replication, that the defendant was never executrix of the will of Francis Hunt Clapp, except of her own wrong, and that at the time of exhibiting the bill of the plaintiff, she, the defendant, as such executrix of her own wrong, had never been called upon to pay, nor had she as such executrix of her own wrong at any time been called upon to pay or paid the said sum of £600 supposed to be so due by virtue of the bond; and that she, the defendant, as such executrix of her own wrong at the time of the exhibiting the bill, had divers goods and chattels which were of Francis Hunt Clapp deceased at the time of his death, in the hands of her the defendant as such executrix as aforesaid, to be administered. Rejoinder, that after the exhibiting of the bill of the plaintiff, and whilst the defendant had leave to imparl to the same, and while the said principal sum of £600 was wholly due and unpaid, to wit, on the 27th of December, 1824, she, the defendant, paid the said principal sum of £600 to Malachi Blake and Mary his wife, as such executrix of the will of Locke as aforesaid. To this rejoinder there was a general demurrer and joinder.

Campbell, in support of the demurrer.

Manning, *contra*, was stopped by the court.

Lord Tenterden, C. J. There must be judgment for the defendant. This case is distinguishable from those cited, because here the defendant does not seek to take advantage of her own wrongful act. The cases cited show that an executor *de son tort* cannot avail himself of his own wrongful act in taking possession of the goods of the deceased in order to retain a debt for his *own benefit;* and on that ground the retainer set up in those cases was not allowed. But here the defendant pleaded, in answer to the plaintiff's claim, that *after* action brought she had disposed of the assets of the deceased in that course of administration which the law allows; viz. by discharging a debt of higher degree. And if at any time before plea pleaded an executor comes to the knowledge of such a debt, he is bound to pay it before a simple contract debt, whether he be a rightful or wrongful executor. I am not prepared to say that if it had been alleged that the payment had been voluntary, the defendant could have justified paying a debt of equal degree with that of the plaintiff; because that might have been taking an undue advantage of her own wrong. It is sufficient in this case that the debt paid was a specialty debt, and that that sued for by the plaintiff was one by simple contract. And in many cases it may be very convenient,

and even necessary, that an executor *de son tort* should dispose of the assets of the deceased in due course of administration.

Littledale, J. I am of the same opinion. An executor *de son tort*, undoubtedly, cannot retain for his *own* debt, and the reason for that is assigned in *Coulter's Case*, 5 Coke, 31, "for from thence would ensue great inconvenience and confusion; for every creditor (and chiefly when the goods of the deceased are not sufficient to satisfy all the creditors) would contend to make himself executor of his own wrong, to the intent to satisfy himself by retainer, by which others would be barred. And it is not reasonable that one should take advantage of his own wrong; and if the law should give him such power, the law would be the cause and occasion of wrong, and of the wrongful taking of the goods of the deceased." But it is there also said, "that all lawful acts which an executor of his own wrong doth, are good." Now, by law, it is incumbent upon an executor to make payment of the debts of the deceased in a certain order, viz., to pay debts by specialty before those by simple contract. The payment of the bond debt in this case, therefore, was a lawful act. It appears to me to make no difference, whether the payment was made before or after action brought by the simple contract creditor. An executor under a plea of *plene administravit* may give in evidence, that before action brought he has exhausted the assets by payment of debts of the deceased not inferior to that of the plaintiff; but he must plead specially payment after action brought. Here the defendant has pleaded it specially, and it was a payment in due course of law.

Parke, J. I am of the same opinion. The principle is, that an executor *de son tort* cannot by his own wrongful act acquire any benefit; for if he could, there would be a struggle among the creditors, and each would contend to make himself executor in order to have the right to retain, which would produce great strife and confusion. He cannot, therefore, retain for his own debt in preference to that of another creditor. But he is protected in all acts not for his own benefit, which a rightful executor may do. Here between the time of the action brought and plea pleaded the defendant had notice of an outstanding bond, which in the due course of the administration of the assets of the deceased ought to be paid in preference to a debt by simple contract; and he made such payment: that was a lawful act, and as to that payment, he is protected. It is true that an executor *de son tort* cannot discharge himself from the debt of a creditor by delivering over to the rightful executor the assets, after action brought, because the creditor would thereby be in a worse situation; he would have to bring a second action against the rightful executor. But this is not such a case. Here the defendant has paid a bond debt in the due course of administration, and the creditor, therefore, could not afterwards maintain any action in respect of that debt against the rightful executor.

Patteson, J. A wrongful and a rightful executor only differ in this respect, that the first is to take no benefit by his own wrongful act; as

regards other creditors, there is no difference; an executor *de son tort*, as well as a rightful executor, may administer the assets in due course of law, and may, therefore, justify the payment of a bond debt, of which he has notice, before a simple contract debt.

Judgment for the defendant.

SHARLAND *v.* MILDON.

CHANCERY. 1846.

[*Reported* 5 *Hare*, 469.]

VICE-CHANCELLOR [SIR JAMES WIGRAM].[1] The widow of a deceased person, — the testator in the cause, — intending to obtain representation to her husband, began to collect his assets before she had obtained such representation, and in the course of doing so she employed the defendant Hewish to collect the debts owing to the testator. Hewish accordingly received several of the debts, knowing them to belong to the testator's estate, and paid them over to the widow. The widow did not afterwards become the legal representative of the testator, and another party has obtained such representation. The consequence is, that the widow might without question be sued as executrix *de son tort*. The question is as to Hewish. The case of *Padget* v. *Priest*, 2 T. R. 97, appears to be an authority for the proposition, that if Hewish in this case had not paid over the money which he received, but had retained it in his hands, he also might have been sued as executor *de son tort*. It does not appear clearly from the report of that case, whether that was the precise ground upon which the judgment went, but according to the marginal note it seems to have been the point decided. One judge, Mr. Justice Buller, however, appears to have expressed a doubt whether the party, if he had been a mere servant, would have been liable. The case, in the present instance, is one of great hardship on Mr. Hewish, and I desired to look into the cases, to see if I could avoid treating him as executor *de son tort*. The fact that he would be liable if he had received the money, and had not paid it over, is admitted, or well established; and if that be so, it seems to follow logically that the defendant cannot discharge himself, except by paying over to the legal personal representative of the testator the money which he has so received. Hewish might have acted in this case purely in a ministerial character, as, for example, a servant might have acted in bringing or removing furniture under the direction of his employer; but the authorities clearly show that the doctrine, — that the possession of an agent is the possession of a principal, has no application to the case of a wrongdoer. *Stephens* v. *Elwall*, 4 Man. & Sel. 259; *Snowden* v.

[1] The opinion only is given.

Davis, 1 Taunt. 359. Although, therefore, the rule operates severely in this case, Hewish, who in the act in question was a wrongdoer, must remain a party to the suit.

Mr. Greene, for the bill.

Mr. W. M. James, for the defendant.

PAULL *v.* SIMPSON.

Queen's Bench. 1846.

[*Reported* 9 *Q. B.* 365.]

Covenant, by executrix of reversioner (her husband joining), for non-payment of rent reserved by an indenture of lease. The declaration stated a demise to one Weklin for thirteen years; covenant by Weklin to pay rent; entry and possession by Weklin; and that, after the making of the indenture, and during the term, all the estate, &c., then to come and unexpired, of Weklin, of and in the demised premises with the appurtenances, "by assignment thereof then made, legally came to and vested in the defendant." Breach, that, after the making of the indenture, "and after the defendant became such assignee as aforesaid, and while he continued to be such assignee," and during the term, &c., rent for one year became due, &c.

Plea: That the estate, &c., of Weklin of and in the demised premises with the appurtenances, "by assignment thereof made, did not come to or vest in the defendant, in manner and form," &c.: conclusion to the country. Issue thereon.

On the trial, before *Wightman*, J., at the sittings in Middlesex during Trinity Term, 1845, it appeared that, while the lease was still subsisting, Weklin died intestate, and his widow kept possession of the premises, and paid rent, but no administration was taken out. A few months afterwards the defendant took possession of the premises, and stated to the agent employed to collect the rents that he was from thenceforth to be the tenant under the lease, which he at the same time produced. He continued in possession till the end of the term, and paid the reserved rent for two years, but omitted to pay it for the last half year, which was the default now complained of. It appeared that there had been some arrangement between the defendant and Mrs. Weklin: but the precise nature of it was not shown; nor was there any express proof of a written assignment. No witness was called for the defendant. Wightman, J., in summing up, told the jury that they might, if they saw ground for it, infer an assignment from the evidence; and, at the instance of the defendant's counsel, who contended that the assignment, if any, must have been written, he left it to the jury to say whether the evidence raised a presumption in their minds that Weklin's remaining interest in the term had been assigned to the defendant in writing.

The learned judge stated that, on the case as it stood, he himself should be disposed to say that the defendant was assignee; if not, he did not know under what circumstances the possession had been taken. The jury found a verdict for the defendant.

Sir John Bayley, in the same term, moved for a new trial on the grounds of misdirection and that the verdict was against the evidence.

Lush, now showed cause.

Sir John Bayley, contra.

Lord Denman, C. J. I should myself have thought it likely that there was a written assignment in this case, though it is often omitted on such occasions: but very probably the finding of the jury was right; and I cannot pronounce that the verdict was against the evidence. As to the question of assignment by operation of law: the defendant here received the lease from the widow, who was executrix *de son tort*, and did not himself interfere in the first instance. There might be a case of collusion, which would make the party so taking a primary dealer with the property; but here that is not shown: the widow takes possession of the lease, and gives it to the defendant; and the transaction has direct authority from the landlord. The effect of the proceeding is, that the defendant and not the widow is to be charged with the rent in future. Sir John Bayley endeavored to draw a distinction between a lease and an ordinary chattel; but there is no ground for it. A lease vests at once, like another chattel.

Patteson, J. The authority of Godolphin is precise on the point that, if one takes goods of the deceased, and hands them to another, this shall charge only the giver as executor *de son tort*. And, in the present case, if there was no evidence that the defendant was executor *de son tort*, there was no evidence that the assignment came by operation of law.

Wightman, J. It was clear that the widow was executrix *de son tort*: the question was whether the defendant took by assignment from her. It could not be an assignment in fact, unless by writing: and I thought there was some evidence of that: but the jury were of a contrary opinion. It might have been an assignment by operation of law; but the mere fact that the defendant had dealt with goods administered by the widow was not sufficient to charge him as assignee in law. The passages from Godolphin and Com. Dig. Administrator (C. 2) are express authorities on this point. If this were not so, there would be no end to the number of persons who might be charged, especially in the case of a long lease, which might pass through a number of hands in succession. Besides, a person who is executor *de son tort* is executor generally; so that the doctrine contended for by the plaintiffs would produce the greatest confusion.

Rule discharged.[1]

[1] Cf. *Norwich* v. *Johnson*, 3 Lev. 35 (1681); *Hill* v. *Curtis*, L. R. 1 Eq. 90 (1865); *Williams* v. *Heales*, L. R. 9 C. P. 177 (1874).

THOMSON *v.* HARDING.

Queen's Bench. 1853.

[*Reported* 2 *E.* & *B.* 630.]

The plaintiff sued as administrator of Alexander William Robert Bosville, deceased, for £2,654 6*s.* 6*d.*, money payable by defendants to plaintiff for money received by them to the use of plaintiff as such administrator and for money due to plaintiff as such administrator on accounts stated between plaintiff and defendants.

"And the plaintiff, as such administrator as aforesaid, claims £2,654 6*s.* 6*d.*, being compounded of the several sums of £906 12*s.*, £747 14*s.* 6*d.*, and £1,000, paid into the banking-house of the defendants by the late Richard Smith, the respective times of such payments appearing by the defendant's books. And the plaintiff will claim interest," &c.

Plea: Never indebted. Issue thereon.

On the trial before *Cresswell*, J., at the Yorkshire Spring Assizes, 1853, it appeared that the intestate had an estate for life in lands let to various tenants. The defendants were bankers at Bridlington in Yorkshire; and the intestate kept an account with the bank. He was in the habit of overdrawing his account largely: and, on 14th January, 1833, he executed a bond to the then partners in the bank, in the penal sum of £4,000, conditioned to secure such disbursements as they, or the partners for the time being, should make for him, not exceeding £2,000 in all. He died, on 23d September, 1847, being then indebted to the bank in above £2,000. Richard Smith, named in the last count, was for some years before and up to the time of the intestate's death, the collector of his rents; and, from the rents so collected, R. Smith used, during the intestate's life, to pay sums into the bank to the intestate's account. After the intestate's death, R. Smith was continued in the employment as collector by the succeeding remainderman. After the intestate's death, R. Smith paid into the bank the three sums mentioned in the last count, which consisted of rents collected, accruing some before and some after the death of the intestate. The payments in respect of rents accrued before the intestate's death, and of the portion of rents due to his estate upon apportionment for the quarter current at the time of such death, did not together exceed the sum due from the intestate to the bank. At the time of the intestate's death one of the obligees of the bond, Edwin Smith, was alive: and Richard Smith, on making the last of the three payments (the £1,000), took back the bond from the bank. Richard Smith paid several other creditors of the intestate from rents accrued before the intestate's death, which he collected after the intestate's death. Subsequently to the making of these payments into

the bank and to the creditors, administration was taken out, on 29th January, 1849. Richard Smith died on 2d September, 1849. The jury found, in answer to a question from the learned judge, that Richard Smith paid the three sums, mentioned in the last count, as in satisfaction of the debt owing to the bank from the intestate. On these facts the learned judge expressed an opinion in favor of the defendants: and the plaintiff was nonsuited, leave being reserved to move to enter a verdict for him.

In Easter Term. 1853, *Watson* obtained a rule accordingly. In Trinity Term, before Lord Campbell, C. J., Coleridge, and Crompton, JJ.

Knowles and *R. Hall* showed cause.

Watson and *Stammers*, contra.

Lord Campbell, C. J. I cannot doubt that there was abundant evidence of R. Smith having acted as executor *de son tort*. But there may be ground for considering whether that is enough to make valid all his acts, or whether, as Mr. Stammers argues, it should be shown that the party receiving the money had reasonable ground for believing that R. Smith was executor; and, if so, whether that ought not to have been put as a question to the jury. I was struck with the difficulty pointed out in Wentworth's Office of Executors, 182, that a stranger might usurp the office of executor and destroy the election of the rightful executor. On the other side, there is the hardship to the creditor if rightful payments to him be not protected: and he would be protected, if the rule were that he might receive the money from one whom he had reasonable ground for believing to be an executor. That view does seem, to a certain degree, to be countenanced by what is said in *Parker* v. *Kett*, 1 Ld. Raym. 661; *Read's Case*, 5 Rep. 33 b; and *Mountford* v. *Gibson*, 4 East, 441. But the point does not seem to have been made at the trial: and I do not know that we can notice it now.

Cur. adv. vult.

Lord Campbell, C. J., now delivered the judgment of the court.

We are of opinion that the rule to enter a verdict for the plaintiff ought to be discharged.

Upon the evidence, it appears that R. Smith, employed to receive the rents of the deceased in his lifetime, after his death continued to receive rents due to him in his lifetime, and, no other representative of the deceased appearing, paid various debts due from the deceased. The defendants were the bankers of the deceased. And the jury found that R. Smith paid them the sums sought to be recovered, to satisfy a debt due to them from the deceased. A considerable time afterwards, administration was granted to the plaintiff; and the present action was brought.

We are by no means of opinion that, as against a person who becomes the rightful representative of a person deceased, every payment from the assets of the deceased shall be valid, if made by a person who has so intermeddled with the property of the deceased as to render him-

self liable to be sued as executor *de son tort.* This he may do, according to the old authorities, by taking a dog or milking a cow of the deceased; and he may clearly do wrongful acts, which would render him liable to be sued as executor *de son tort*, without giving validity to his alienation of the property of the deceased; "for then any stranger might usurp the office of executor, and take from him that liberty and election, to prefer which creditor he will in first payment; yea, might take from the executor the power to pay himself before others, in case there were a debt due to him, which were very unreasonable," Wentworth's Office of Executor, 182. "A single act of wrong in taking the goods of the intestate, though it may be sufficient to make the party an executor *de son tort* with respect to creditors who may choose to sue him in that character, yet will not give him any right to retain them as against the lawful administrator." "When it is laid down generally that payments made in the due course of administration by one who is executor *de son tort* are good, that must be understood of cases where such payments were made by one who is proved to have been acting at the time in the character of executor." "An act" "may be well sufficient to charge the party himself as executor *de son tort*, which would not be sufficient to justify a wrong-doer claiming title under it." So the law is expounded by Lord Ellenborough in *Mountford* v. *Gibson*, 4 East, 445, 446, 447. But, where the executor *de son tort* is really acting as executor, and the party with whom he deals has fair reason for supposing that he has authority to act as such, his acts shall bind the rightful executor, and shall alter the property. Says Lord Holt, in *Parker* v. *Kett*, 1 Ld. Raym. 661: "The reason is, because the creditors are not bound to seek further than him who acts as executor; therefore, if an executor *de son tort* pays £100 of the testator's in a bag to a creditor, the rightful executor shall not have trover and conversion against the creditor."

In the present case, R. Smith may be considered as acting in the character of executor, seeing that for months he administered the assets of the deceased; and the defendants, when the payments were made to them by him in satisfaction of their debt due to them from the intestate, might reasonably have supposed that he had authority to make the payments.

This being taken as a fact (and there was no desire expressed at the trial that it should be left to the jury), we are of opinion that the nonsuit was right.

Rule discharged.

PERKINS *v.* LADD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1874.

[*Reported* 114 *Mass.* 420.]

TORT, brought by the administrator of the estate of Frank A. Rolfe, for the conversion of two horses belonging to the estate.

At the trial in the Superior Court, before *Lord*, J., there was evidence to show that the plaintiff's intestate, an officer in the United States army, was killed in the battle of the Wilderness in 1864; that his horses, sword and various other articles were sent by the general of the army to Washington, D. C., directed to the care of the defendant, a paymaster in the United States army, who forthwith forwarded all the articles, except the horses, to the widow of the deceased at Lawrence, Mass., where she then resided; that the horses were sick and diseased and in bad condition; that they were put in a stable under the charge of a stablekeeper, and that the defendant sought of the widow directions as to what disposition should be made of them; that she thereupon directed him to have them sold at Washington, and to send her the proceeds; that the defendant, in accordance with her directions, employed an auctioneer to sell them for her at public auction, and sent her the proceeds, which she received; that the stable-keeper's charge for keeping was $1.00 per day for each horse; that the defendant never acted or claimed to act concerning the horses except in accordance with the directions of the widow; that he never had any personal benefit from the horses or the proceeds, and that he charged nothing for his services; and that these transactions all took place within a few weeks of Rolfe's death.

The plaintiff contended that the defendant acted for himself, and that he neither was, nor could be, justified in what he did touching the disposal of the horses by any power which the intestate's widow did or could confer upon him. He also contended that the sale was a pretended one, made pursuant to a secret arrangement between the defendant and the auctioneer, by which the possession of the horses, or of one of them, passed to the defendant, in fraud of the plaintiff's intestate's estate.

The court instructed the jury that under the laws of Massachusetts the widow was *prima facie* entitled to administer upon the estate of her deceased husband; that if Mrs. Rolfe, immediately upon knowing that the effects of her deceased husband were in the care of the defendant at Washington, requested him to act in reference to them in her behalf, and he did so act in good faith (said property being perishable in its nature), and made the sale as her agent and at her request, and in all respects accounted with her for all which he received, that he was not liable; but that if he undertook in any manner to act in his own

behalf, or to secure for himself directly or indirectly any benefit from the sale of the horses, or if there was any secret arrangement or understanding between himself and the auctioneer that he was to become possessed of one or of both the horses under a pretended sale, then the action might be maintained, and he would be liable for the value of the horses to the present plaintiff.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

C. Cowley, for the plaintiff.

D. S. and *G. F. Richardson*, for the defendant.

DEVENS, J. The rights of the plaintiff, who seeks to recover here for an alleged conversion of the property of his intestate, must be governed by the principles which would control in an action for wrongful intermeddling with the estate by one who it was claimed had thereby rendered himself liable as executor *de son tort*. Under Gen. Sts. *c.* 94, § 14, any one intermeddling injuriously with the estate of a deceased person without being thereto authorized by law, is liable to the persons aggrieved as an executor in his own wrong; and by section 15 of the same chapter, every executor in his own wrong is liable to the rightful executor or administrator for the full value of the goods taken by him, and for all damage caused by his acts to the estate of the deceased.

Upon the evidence in the case, the defendant was rightfully in possession of the horses, the value of which is sued for, the intestate having been an officer of the United States army, killed at the battle of the Wilderness in 1864, and his effects having been, by the direction of the commanding general, placed in charge of the defendant, who was then a paymaster in the army. Under the instructions, the jury must have found that, upon being informed that the effects of the intestate were in the care of the defendant at Washington, his widow requested him to act for her in reference to them; that he did so in good faith; that, the property being perishable in its nature (consisting of horses diseased and in bad condition, which could only be kept at great and disproportionate expense), he, in compliance with her directions, sold them and remitted to her the proceeds; and that he in no manner acted in his own behalf, nor in any way, directly or indirectly, secured to himself any benefit from the transaction.

The acts of the defendant, upon which it is sought to charge him, were done in 1864, and it would be unfortunate in the present case if the general principles of law were such as to compel us to charge the defendant (who appears to have acted throughout with the honorable purpose of saving the effects of a fellow soldier, and neither to have asked nor received compensation for his services) with liability in a suit brought so long after the transactions referred to. We are of opinion that they do not so compel us, and that the ruling under which a verdict was rendered for the defendant is not open to exception.

Upon the death of a person, a short time must necessarily elapse before title to his personal property can be acquired by the issue of letters

testamentary or of administration. Within this period, however, many acts must be done if such property is to be suitably preserved. Goods must be stored, animals fed and cared for, and perishable property must be disposed of. As by Gen. Sts. c. 94, § 1, the widow, or next of kin, or both, as the Probate Court shall see fit, are entitled to the administration, no person can be more suitable than the widow to take such temporary charge of the property. We are to consider whether one who aids her in this, acting simply as her servant and agent, becomes liable for the value of the goods which he thus assists her in caring for, and, when the property is perishable, in disposing of.

It was formerly held, with great strictness, that no one could interfere in the least with the estate of a deceased person. This was carried to such an extent, that a wife has been held liable as executrix *de son tort* for milking the cow of her deceased husband. *Gerret* v. *Carpenter*, 2 Dyer, 166, note. But it is now determined that there are many acts which do not make one liable, such as locking up the goods of the deceased for preservation, directing the funeral and paying the expenses thereof, feeding his cattle, &c., for these are necessary acts of kindness and of charity. 1 Williams on Executors (4th Am. ed.) 214, and cases there cited. *Camden* v. *Fletcher*, 4 M. & W. 378.

In *Padget* v. *Priest*, 2 T. R. 97, Mr. Justice Buller intimates that if the defendant had acted merely as the servant of another, he should not be held liable. In *Brown* v. *Sullivan*, 22 Ind. 359, it was held that taking possession of property at the request of the widow of the deceased, for the purpose of taking care of it, did not make one liable as executor *de son tort*. In *Givens* v. *Higgins*, 4 McCord, 286, it was held that one acting as agent for the widow, and not knowing in what character she was acting, would be considered as her agent merely, and not as exercising such control over the funds of the estate as to make himself liable. In this case the defendant had, by direction of the widow, transferred certain property of the deceased in payment of one of his debts. In *Magner* v. *Ryan*, 19 Missouri, 196, it was held that a person who had, by direction of the widow, sold certain goods and paid over to her the proceeds, was not liable as executor *de son tort*, and that no one was liable as such for acts in reference to the administration of an estate, which he had done merely as the servant of another.

Both these last cases go much further than the present case, and perhaps further than we should be willing to go. The rules against intermeddling with the estates of deceased persons are important, as the interval of time between the decease and the appointment of an administrator affords opportunities of which evil disposed or even intrusive and officious persons should not be allowed to take advantage, by interfering with the administration of the person who may thereafter be appointed. When, however, one can show (and this is all that it is requisite in order to sustain the ruling of the presiding judge) that he has acted in good faith, at the request of the party entitled to administration,

in doing an act in disposing of perishable property apparently necessary for the purpose of having its proceeds reach those entitled to them, and has paid over the proceeds to the party at whose request he has thus acted, he is not responsible for a wrongful conversion of the property.

Exceptions overruled.

NOTE. — Where there is no dispute as to the facts, the question whether one is executor *de son tort* is for the court, not the jury. *Padget* v. *Priest*, 2 T. R. 97 (1787).

A widow paying out her husband's money in support of the family "before any certain knowledge of his death" is not an executrix *de son tort*. *Brown* v. *Benight*, 3 Blatchf. 39 (1832). Cf. also *Brown* v. *Leavitt*, 26 N. H. 493 (1853); 1 Woerner, Amer. Law of Adm. § 198.

SECTION IV.

GRANT OF ADMINISTRATION.

ST. 13 EDW. I. (WESTM. II., 1285) c. 19. — Whereas after the death of a person dying intestate, which is bounden to some other for debt, the goods come to the ordinary to be disposed; (2) the ordinary from henceforth shall be bound to answer the debts as far forth as the goods of the dead will extend, in such sort as the executors of the same party should have been bounden, if he had made a testament.

ST. 31 EDW. III. (1357) c. 11. — Item, it is accorded and assented, that in case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods; (2) which deputies shall have an action to demand and recover as executors the debts due to the said person intestate in the king's court, for to administer and dispend for the soul of the dead; (3) and shall answer also in the king's court to other to whom the said dead person was holden and bound, in the same manner as executors shall answer. (4) And they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as of the time to come.

ST. 21 HEN. VIII. (1529) c. 5, §§ 3, 4. — § 3 . . . (6). And in case any person die intestate, or that the executors named in any such testament refuse to prove the said testament, then the said ordinary, or other person or persons having authority to take probate of testaments, as is abovesaid, shall grant the administration of the goods of the testator, or person deceased, to the widow of the same person deceased, or to the next of his kin, or to both, as by the discretion of the same ordinary shall be thought good, taking surety of him or them, to whom shall be made such commission, for the true administration of the goods, chattels, and debts, which he or they shall be so authorized to

minister; (7) And in case where divers persons claim the administration as next of kin, which be equal in degree of kindred to the testator or person deceased, and where any person only desireth the administration as next of kin, where indeed divers persons be in equality of kindred, as is aforesaid, that in every such case the ordinary to be at his election and liberty to accept any one or mo making request, where divers do require the administration.

§ 4. Or where but one or more of them, and not all being in equality of degree, do make request, then the ordinary to admit the widow, and him or them only making request, or any one of them at his pleasure. . . .

St. 29 Car. II. c. 3, § 25 (1676). — And for the explaining one Act of this present Parliament, intituled, *An Act for the better settling of intestates' estates* [22 & 23 Car. II. *c.* 10 (1670)]. (2) Be it declared by the authority aforesaid, that neither the said Act, nor anything therein contained, shall be construed to extend to the estates of *feme coverts* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said Act.

JONES *v.* ROE.

King's Bench. 1628.

[*Reported W. Jones*, 175.]

In an appeal on a commission of delegates granted to Jones, Whitelocke, Croke, and Yelverton, Justices, and Doctor Steward, Doctor Pope, and others, the case was this, Whether the administration of the wife's goods ought to be granted and committed to the husband *de mero jure* or not. And Jones, Whitelocke, and Yelverton were of opinion that it ought (*absente* Croke), the two doctors *contra*. And the reasons of the justices were as follows: Before the Statute of 31 Edw. III., the ordinary had power only to meddle with the goods in possession of a man intestate, and had nothing to do with debts or *choses in action*, nor could he release any debt nor sue for it, but if the debtor would voluntarily pay to the ordinary, then he could receive it, and distribute it as well as the other goods of the testator *in pios usus*, *quod vide* in *Greshold's Case*, Plowd. Comm. and 12 Hen. VII. 22, and all the books.

Before the said Statute, it seems that the ordinary had nothing to do with the goods or debts of a *feme covert* (unless where she was executrix to another, and the goods or debts not administered), for the goods in possession of the wife were the husband's by the marriage, and

the wife had nothing in them; but of the *choses in action* the husband during the coverture could release them if he wished, but if the wife before recovery died, the husband could not sue for them, nor the ordinary have to do with them, but the debtor would have the advantage of it. But the course in such a case to prevent this was, to make an executor, which the wife could do with the assent of the husband, but not without his assent; and she could make her husband executor, and he by this means, as executor of his wife, could recover the debts. 39 Hen. VI. 27 and 51; 22 Hen. VII. 22; 26 Edw. III. 71; 6 Edw. II., Fitz. Executor, 109; 4 Hen. VI. 31, 32; 5 Edw. II., Fitz. Devise, 24; and 28 Hen. VIII. *c.* 9, *Stat. Hiberniæ*.

The Statute of 31 Edw. III. gives power to the ordinary to commit administration to the next and most lawful friends of the intestate, who had power to dispose of the goods *pro salute animæ*, and there is no nearer and more lawful friend to the wife, than the husband, and he when the wife dies is the one who takes care for the funeral and other things pertaining to it, and so the administration ought to be committed to him. And this power given to the ordinary ought to be strictly pursued and not to be granted at his discretion; and the Statute of 22 Hen. VIII. does not extend to this case, for there where the husband died intestate, the widow or the next of kin would be joined in one; but if the wife was executrix and died intestate, there the ordinary could commit it to the next friends of the first testator. And for the main point it is so resolved in *Ognell's Case*, 4 Co.; and on all the said reasons, they were of opinion as aforesaid.[1]

[1] S. C. *sub nom. Johns* v. *Rowe*, Cro. Car. 106.

"Where the wife dies, the husband is to have the administration, being the only true and lawful next of kin by the Statute of Edw. III. St. 1, *c.* 11." — *Fortre* v. *Fortre*, (B. R.) 1 Show. 351 (1692).

"Besides that, the description of next of kin of the wife can in no respect apply to the husband. He is entitled to the personal property of his wife *jure mariti*: her personal property vests in him by the marriage. At the death of the wife, if it is necessary for him to have an administration to enable him to get in her personal property, the administration granted to him is granted to him as husband; and when you look at the Statutes, there is no law, that gives the husband a right by force of the Statute to administer to his wife. The husband's right is supposed in all the Statutes. The Statute of 21 Hen. VIII. c. 5, which directs who shall have administration, takes no notice of the husband: they are to grant it to the widow or the next of kin, or both. That Statute therefore does not take the widow to be the next of kin. It takes no notice of the widower; for the law gives it to him; and where it was necessary for him to have the authority of the ecclesiastical court to enable him to obtain her personal property, he had a right to it. The Statute of Frauds has a clause, that the Statute of Distributions shall not prejudice the right of the husband; under an apprehension, that his right might be considered to be affected by that Statute. The husband is not of kin to the wife, nor she to him. The Statute gives administration to the widow. She is not next of kin, but takes as widow." — *Per* LORD LOUGHBOROUGH, C., in *Watt* v. *Watt*, 3 Ves. Jr. 244, 246, 247 (1796).

YOUNG *v.* PEIRCE.

COURT OF DELEGATES. 1689.

[*Reported* 1 *Freem.* 496.]

UPON an appeal to the delegates, the case was, that Henry Peirce died intestate, leaving issue Jo. Peirce and Anne Peirce; his personal estate being valued at about £3,500. Anne Peirce agreed to take £1,500 for her share; and thereupon agreed, that Jo. Peirce should take administration, and released her right to the personal estate. Jo. Peirce paid the £1,500 and dies, and makes Young his executor, and devises to him all his personal estate, there being £1,000 out upon bond of Henry Peirce's estate. The question was, whether Young, the executor of the son, or Anne, the daughter, who was since married to Mr. Webbe, should have administration? And *Dr. Raynes*, the judge in the Prerogative Court, gave it to Young; whereupon Mr. Webbe and his wife appealed; and the delegates of the common law were POWELL, GREGORY and TURTON; and the civilians were LITTLETON and NEWTON, &c.

And they affirmed the sentence in the Prerogative Court; because they said, that Young, as executor of Jo. Peirce, was in equity entitled to all benefit of the personal estate of H. P. by reason of the agreement; and it was like *Isted's Case*, of an executor dying intestate that was a residuary legatee, administration shall be committed to him; and one *Henson's Case* was cited, where a will is made, and no executor appointed, administration shall be committed to the residuary legatee.[1]

[1] The reporter's observations are omitted.

"The reason that 21 H. 8 requires that administration should be granted to the next of kin was, upon the presumption, that the intestate intended to prefer him: but now the presumption is here taken away, the residuum being disposed of to another; and to what purpose should the next of kin have it, when no benefit can accrue to him by it? And 't is reasonable that he should have the management of the estate, who is to have what remains of it after the debts and legacies paid. And the averment, that there is no residuum, is not material; for being once out of the Statute, upon construction of the words of the will, there is nothing *ex post facto* can bring it within it. And there are certain administrations which have been always ruled to be out of the Statute, as administrations during minority, and *pendente lite*, which need not be granted to the next of kin, and granting it to the husband comes not within the words of the Statute." — *Thomas* v. *Butler* (B. R.) 1 Vent. 217, 219 (1672).

Cf. 2 Hag. Ecc. App. 150–157.

MANNING *v.* NAPP.

King's Bench. 1692.

[*Reported* 1 *Salk.* 37.]

H. DIED intestate, leaving no children or kindred: the king appointed the plaintiff to take out administration; the defendant, though he knew there was no kindred, entered *caveats*, and put the plaintiff to great charge. For this cause the plaintiff brought an action. Upon demurrer the court doubted whether an action would lie; because, though there was a *damnum*, yet it was *absque injuria;* for the property of the goods till administration was in the ordinary, and the plaintiff had neither *jus in re nec ad rem.* Otherwise, had the plaintiff been next of kin, because he had a right to administer by the Statute; and the king's appointment by letters patent was but a kind of recommendation. For they held, that in case of an intestate without kindred, the ordinary may dispose *in pios usus;* but the usual course is for some one to procure the king's letters patent, and then the ordinary admits the patentee to administration; but the court thought this was rather of respect than of right, and they denied the opinion in 9 Co., *Hensloe's Case;* and held that administrations originally belonged to the bishops, and the instance of some lords of manors is not a proof of the contrary.

SMITH'S CASE.

King's Bench. 1731.

[*Reported* 2 *Stra.* 892.]

MR. REEVE moved for a *mandamus* to *Dr. Bettesworth,* commanding him to grant administration to Smith of the goods of his deceased son, *durante minori ætate* of his grandson.

Fazakerley, contra, insisted, that the father has not an equal right with the son; and that the spiritual court has always considered these administrators only as trustees for the infant, and have never kept to any rule in granting them, but according to the circumstances of the family; where there are several in equal degree, as children, they have always chosen which they pleased.

ET PER CURIAM. When we grant *mandamus's*, it is to oblige the judge to do right to the party who sues the writ; but as there is no law which says to whom these administrations during minority shall be granted, there is no law to be put in execution. In the case of the next of kin he is entitled *de jure*, and therefore in his case we grant a *mandamus* of course. We will grant no writ in this case.[1]

[1] And see *Rex* v. *Bettesworth,* 2 Stra. 956 (1733.)

WALKER *v.* WOOLLASTON.

King's Bench. 1731.

[*Reported* 2 *P. Wms.* 576.]

This was a judgment given in the Common Pleas, wherein the now defendant was plaintiff, in an *assumpsit* on a promissory note brought by the then plaintiff Woollaston, as administrator *de bonis Nathanael' Clerk, non administrat'* by Frances his late wife and executrix, *pendente lite* in the spiritual court touching the will of the said Frances, in which suit in the spiritual court Woollaston, the executor named in the will of Frances, was plaintiff, against the nephews and nieces of Frances Clerk: the plaintiff in the court below recovered judgment, and £52 damages, upon which the defendant below (Walker) bringing a writ of error, and assigning the general errors:

The question was, whether an administrator *pendente lite*, where the suit in the Spiritual Court is touching the executorship, may maintain an action for recovering the debts due to the deceased?

Whereupon the Lord Raymond, Chief Justice, Page and Probyn, Justices, were of opinion for affirming the judgment; and that the ordinary had a power to grant administration *pendente lite*, though touching an executorship; that the reason of the ordinary's having a power to grant administration *durante minore ætate* of an executor was, because during the infancy of the executor there was no person capable of suing or recovering the debts of the deceased; that *pendente lite* there being no executor that can sue, such case is within the same mischief, which would be attended with very great inconveniences, for the reasons that had been given; that the case of an administrator during the absence of the executor was stronger, there being an executor capable of acting, who might by commission prove the will, and sue by attorney; that all these temporary administrations, though out of the Statutes of Edw. 3 and Hen. 8, were yet allowed to be within the equity of those Statutes for the ease and convenience of the subject, which ought to be considered; that in the cases cited from Moor and Carthew there was no judgment; and the reason given in the latter of those books, did not maintain the opinion.

But Lee, Justice, doubted; for he said, an administration *pendente lite* touching the executorship seemed to differ from administrations *durante minore ætate*, or *durante absentia* of an executor, because in the two last cases the administrations were granted *cum testamento annexo*, which cannot be done when the will is in controversy; *et adjorn'*. But judgment was afterwards affirmed with the concurrence of Mr. Justice Lee.[1]

[1] See *Clare* v. *Hedge*, cited 1 Lutw. 342 (B. R., 1691).

GOODS OF GILL.

PREROGATIVE COURT OF CANTERBURY. 1828.

[*Reported* 1 *Hag. Ecc.* 341.]

MARY ALICIA GILL was the party deceased: she died in the lifetime of her husband, John Gill, from whom she had lived apart for many years. On her death, a probate of a paper, purporting to be her will, was taken in this court in the month of March, 1813, by William Cooper — the sole executor therein named — on the supposition that she had died a widow.

Dodson now prayed that the probate should be revoked, as the paper was executed during coverture, and was therefore null; and applied for an administration to be granted to Alice Ainsworth, widow — the lawful mother of the deceased, she having left no children, nor father.

PER CURIAM. The practice of granting these administrations to the representatives of the wife, when the beneficial interest in the property belongs to the representatives of the husband, is very inconvenient, and in defiance of all principle. Notwithstanding the Statutes require that administration shall be granted to the next of kin, it has been solemnly decided that the residuary legatee is entitled, and it has always since been the constant practice so to grant it. In that and every other instance but the present, the right to administration follows the right to the property; but in a case said to have been argued here by Lord Mansfield, then at the bar; as also in a case before the High Court of Delegates, in 1748, it was ruled that the court was bound, by the Statutes, to grant the administration to one of those persons who were next of kin of the wife *at the time of her death:* but if the persons, who at that time were her next of kin, die before the grant of administration, it has always been held that the court may exercise its discretion.

I have directed the cases to be looked up, as I feel inclined, if the point should hereafter come before me, in a contested form, to send it up for the decision of the Court of Delegates, in order that the question may there be deliberately reconsidered.

In the present instance, I shall allow the administration to pass, a proxy of consent from the representative of the husband — who is a party to the proceedings in Chancery — being first exhibited.

Motion granted.[1]

[1] In *Fielder* v. *Hanger*, 3 Hag. Ecc. 769 (1832), the Prerogative Court of Canterbury granted administration *de bonis* on the wife's estate to the husband's representative, and such has been the practice since. Cf. 2 Hag. Ecc. App. 157-177.

GOODS OF BINCKES.

PREROGATIVE COURT OF CANTERBURY. 1836.

[*Reported* 1 *Curt.* 286.]

HENRY BINCKES, late of Little Newport Street, in the county of Middlesex, died intestate on or about the 19th of October, 1826, leaving his widow and several children him surviving; in the following month of November, letters of administration of the effects of the deceased were granted to the widow, who, in the month of November, 1832, became, and still continued to be a lunatic. *Lushington* prayed the court to revoke the administration granted to the widow, and to grant an administration to Henry Edwin Binckes, one of the children of the deceased, and cited *Phillips dec.*, 2 Add. 335, and *Crump dec.*, 3 Phill. 497.

The COURT declined to revoke the administration; but granted administration of the effects of the deceased to the son, limited during the lunacy of Ann Binckes, the widow the letters of administration heretofore granted to the widow being first brought into and impounded in the registry, in order to be re-delivered out in case of her recovery.[1]

DYKE *v.* WALFORD.

PRIVY COUNCIL. 1846.

[*Reported* 5 *Moo. P. C.* 434.]

THE RIGHT HON. T. PEMBERTON LEIGH.[2] The question in this case, relates to the right of administration to the goods of a bastard, who died intestate and unmarried, in the county of Lancaster. The contending parties are the nominee of her Majesty, in right of her crown, and the nominee of her Majesty, in right of her Duchy of Lancaster.

In the Consistory Court of Chester, where the cause was first heard, a decision was pronounced in favor of the nominee of the Crown. This sentence, however, was reversed, on appeal to the Consistory Court of York, which pronounced in favor of the nominee of the Duchy; and from this latter sentence the cause now comes by appeal before us.

The claim of the Duchy is founded upon a grant made in the year 1377, by Edw. III. to John of Gaunt, Duke of Lancaster, by which

[1] But see *Goods of Phillips*, 2 Add. 335 (1824).

On other limited forms of administration, see *Goods of Metcalfe*, 1 Add. 343 (1822); *Goods of Steadman*, 2 Hag. Ecc. 59 (1828); *Davis* v. *Chanter*, 2 Phil. 545 (1848); 1 Wms. Exec. (8th ed.), 486–585; 1 Woerner, Amer. Law of Adm. § 248.

[2] The opinion only is given.

the county of Lancaster was granted as a County Palatine, with various liberties and franchises to the duke, for his life. By subsequent charters and Acts of Parliament, the Duchy, with such rights as were originally granted with it, is now vested in her Majesty, by a title distinct from that of her crown.

The sentence complained of, has decided that, amongst the franchises granted to the Duchy, was the right of administration to the estates of intestates dying without kindred.

The appellant has made two principal points: he contends, first, that, at the date of the grants, in question, the right now in dispute, was vested, not in the Crown, but in the Church, and could not, therefore, pass by the grant. Secondly, that if the right was at that time in the Crown, the words of the grant were not sufficient to pass it to the Duchy.

We will consider these points in their order.

It was argued, indeed, on behalf of the respondent, that it was immaterial, whether this right existed in the Crown, at the date of the grant, or not; for that, if it accrued subsequently, as one of the *jura regalia*, it would pass, under the preceding grant of *jura regalia*, to the Duchy; and authority was cited, which was supposed to favor that proposition. As we are satisfied, however, that this right existed in the Crown, at the date of the Duchy charter, it is not necessary to consider this point.

Great learning and research were exhibited by the counsel on both sides, in the argument of this question, to show, to whom, in very ancient times, the personal property of persons, dying intestate, of right belonged; and we were referred to a series of authorities, beginning in the Anglo-Saxon period, and extending to very recent times. We have carefully examined and considered these authorities, which, although they leave some parts of the subject involved in obscurity, remove all doubt, in our judgment, as to the material point, in this case, and show, that the clergy had never, at any time, in this country, by law, any beneficial interest in the property of intestates, but merely the right or duty of jurisdiction and administration, and the right of possession, for the latter purpose.

In the earliest times of our history, the clergy do not appear to have interfered at all in cases of intestacy. The Statute of Canute, *c.* 71, in the Collection of Ancient Laws and Institutes, 8vo ed., vol. i. p. 413, provides for the distribution of the property of an intestate, amongst his wife and relations, under the direction of his lord. The Statute is in these words: "Of the Heriot: And if any one depart this life intestate, be it through his neglect, be it through sudden death, then let not the lord draw more from his property than his lawful heriot; and, according to his direction, let the property be distributed very justly to the wife and children, and relations, to every one according to the degree that belongs to him." This Statute must be attributed to some time between the years 1017 and 1035.

The Statute of William the Conqueror, *c.* 34, at page 481 of the Collection, above referred to, provides, that if a man die without a will, his children shall divide the inheritance equally.

In neither of these Statutes is there any mention, either of the Church, or of pious uses. The first occasion in which we find any reference to pious uses, in the disposition of the estates of intestates, is in a law of Henry I., *c.* 1, § 7 (Collection of Ancient Laws, page 500), which declares that any of the king's barons, or men, may dispose of his *pecuniam* as he pleases, but if he shall have made no disposition, his widow or children, or relations, or liege men, shall distribute it for the good of his soul, as they shall see fit.

Here again there is no mention of the Church; but when regard was to be had to the supposed good of the soul of the deceased, or what were called "pious uses," in the disposition of his property, after his death, an obvious reason was afforded for the interference of the clergy; and accordingly we soon afterwards find traces of their exercising authority in cases both of testaments and intestacies; but without any trace of a beneficial interest being claimed by them in either case.

The Magna Charta of King John, which was referred to as evidencing some right in the Church, at that time, provides, by the 26th chapter, that if any holders of the king in lay fee, should die indebted to the Crown, the debt should be first paid out of his goods, and "the residue should remain to the executors, to perform the testament of the dead, and if nothing be owing to the king, all the chattels should go to the use of the dead, saving to his wife and children their reasonable parts." The 27th chapter (which seems to be omitted in the Magna Charta of subsequent reigns) enacts, that if any person die intestate, his chattels shall be distributed "per manus propinquorum, parentum et amicorum suorum, per visum Ecclesiæ," reserving to every one the debts due to him from the deceased.

Here the Church appears to be intrusted with the same right or duty of supervision, which the Statute of Canute had intended to vest, or assumed to be vested, in the lord; but there is obviously nothing which gives to the Church any beneficial interest, or assumes the existence of any such beneficial interest. On the contrary, even in cases where testaments were made, and as against the dispositions of such testaments, it reserves to the wife and children their reasonable parts.

At what time, or in what manner, the right of jurisdiction by the Church, in cases either of testaments or intestacies was originally acquired, does not distinctly appear. Previously, however, to the reign of Edward the First, this jurisdiction had become generally vested in the clergy, and usually in the bishop of the diocese where the goods were situate, although, in many cases, this right of jurisdiction was exercised, and is still retained, by lords of manors and others. The bishop, being the usual judge in such cases, was, from this circumstance, styled the ordinary, by way of distinction, from his extraordinary or peculiar jurisdiction (Swinburne, 380).

It was the office of these tribunals to judge of the validity of wills, and, upon being satisfied with the proof, to give authority to the persons named for that purpose in the instrument, in other words, to the executors, to perform them. If no executors were named, or if the executors named, refused to act, the ordinary, or other person having the jurisdiction, was bound, by himself, or his deputy, to carry them into effect; and in like manner, where no will was made, to carry into effect that disposition of the dead man's personal estate which the law prescribed.

But in cases of intestacy, the ordinary, or his deputy, could only deal with such goods of the intestate as he could seize into his possession, and could neither sue for debts due to the intestate, nor be sued for debts due from him. To remedy this last injustice, the Statute, 13 Edw. I. *c.* xix. was passed, a Statute, which was much relied on by the appellant. It recites, "that, after the death of a person dying intestate, which is bounden to some other for debt, the goods come to the ordinary to be disposed;" and it enacts, "that the ordinary from henceforth shall be bound to answer the debts as far forth as the goods of the dead will extend; in such sort as the executors of the same party should have been bounden, if he had made a testament."

It was argued, that it appears from this Statute, that the ordinary was previously entitled to the goods of the intestate, free even from his debts. But this is to mistake its import. It shows, that the ordinary could not be sued for the debts owing from the deceased, and that the right of disposition or administration was in the ordinary; but it leaves the question, who were the parties beneficially interested, quite untouched. This is clear from the circumstance, that it applies to all cases of intestacy, even to those where there were a widow and children; yet, at this period, perhaps throughout all England, but certainly in the province of York, with which we are now dealing, the widow and children are entitled to two thirds of the personal estate of the intestate. Probably also, the Statute would apply to the case, where no executors being named in a will, the testament was in law, imperfect, and the right of administration devolved on the ordinary, for the purpose of carrying the will into effect.

But although the right of the ordinary was one merely of administration, it is obvious that, at the period of which we are speaking, it would be very difficult, and perhaps impossible, to compel any satisfactory account from the bishop, in any court, spiritual or temporal; and if the administration was had, as probably it would be, by a deputy, the deputy was liable to account only to his principal. Under these circumstances, it was to be expected that gross abuses would prevail, and that the property would often be misappropriated to the use of the administrators; and so much the more, as regard was to be had to the good of the soul of the deceased, in the distribution of his estate, and this consideration would leave a large discretion to the ordinary. We find accordingly, that such abuses did prevail,

but they were treated as abuses by both the ecclesiastical and civil authorities, and attempts were made by both, to correct and repress them.

In 1341, Archbishop Stratford published his Constitution, *De Testamentis*, and after referring to an earlier Statute of Archbishop Boniface, as having been called into doubt, he makes various provisions to prevent extortion upon probates of wills, and then enacts, "that bishops and other inferior ecclesiastical jurisdictions, shall in no manner interfere with the goods of testators, but permit the executors freely to dispose of them, and in case of persons dying intestate, after payment of debts, shall distribute and employ the remaining goods, to pious uses, to the relations and servants and friends of the deceased, or others, for the benefit of his soul, retaining nothing for themselves, unless, perhaps, a reasonable compensation for the labor of the ordinary;" and obedience to this decree is enforced under pain of excommunication.

Nothing can be more conclusive than this ordinance upon the question of right; but probably it was found insufficient to prevent the malpractices of the ordinary and his deputies, and a much more effectual remedy was introduced, by the 31 Edw. III. Stat. i. *c.* xi., which took from the ordinary, in cases of intestacy, the right of personal administration, or of selecting a deputy, at his pleasure, and compelled him to grant administration to those who were most interested in the property, viz., the nearest relations of the deceased. This Statute also gives to the persons, so to be deputed, the right to sue for debts due to the deceased, "for to administer and dispend for the soul of the deceased," and subjects them to actions, as executors are answerable, and provides, "that they shall be accountable to the ordinaries, as executors be in the case of testament, as well for the time past, as to come."

This Statute was passed in the year 1357, just twenty years before the date of the Duchy Charter, and it is clear that the Church, at this time, had no right or interest, of any kind, in the property of deceased persons, beyond the right of jurisdiction, and of granting administration and the right of possession for that purpose. This Statute provides only for the case of intestates leaving kindred, but no attempt was made in the argument, to show any distinction, before this Statute, between the case of an intestate leaving kindred, and the case of an intestate dying without kindred, as far as regards the right of the Church.

The law, as it regards the succession to intestates, dying without kindred, is stated with perfect clearness by Lyndwood, who wrote in the reign of Henry the Sixth, and died in the year 1446. In his *Provinciale*, in commenting upon the Constitution of Archbishop Stratford, already referred to, after stating, very distinctly, the right of succession of relations, he distinguishes in the case of an absence of kindred, between the succession to a clerk, and the succession to a

layman. In the case of a clerk, he states that, with certain exceptions, the Church succeeds; in case of a layman, the Crown. The words are, "In laico autem decedente ab intestato, deficientibus consanguineis et uxore, succedet fiscus" (Lyndwood, page 180).

It was suggested by Sir David Dundas, in his very able argument, that possibly the right of the Crown was founded upon an equitable construction of the Statute of Edw. III., last referred to. If it were so, the Statute was passed before the date of the charter, and the right, therefore, at that time existed; but in truth, the Statute refers only to the legal right of distribution, and not at all to the beneficial interest. This Statute was founded on the principle, that the administration of the property ought to be granted to those who were beneficially interested in it, and as it was for that reason given to the nearest relations, when the intestate left relations, it is very probable that, by analogy, the ecclesiastical courts thought it right to grant the administration to the nominee of the Crown, when the Crown was interested, and in this sense the opinion, expressed by the judges, in *Manning* v. *Napp*, 1 Salk. 37, that the grant of administration, "to the nominee of the Crown was of respect, rather than of right," may be well founded. But if the administration was granted to any other person, the right of the Crown would remain the same. The administrator, whoever he might be, would be a trustee for the Crown.

The right of administration is very properly held, by the ecclesiastical courts, to follow the right of property, in other cases, not provided for, by this or subsequent Statutes. When a wife dies, leaving outstanding personal estate, administration is granted to the husband, not in obedience to any Statute, but because he has the right of property. *Watt* v. *Watt*, 3 Ves. 246.

The case, indeed, of the appellant, in this branch of the argument, labors under this insuperable difficulty: If the clergy had the right at the date of this charter, how did they ever lose it? If the Crown had it not, how did it subsequently acquire it? The origin of this right shows that, if it existed at all, it must have existed from the foundation of the monarchy; it is the right of the Crown to *bona vacantia;* to property which has no other owner. This is the ground upon which it is plainly rested by Lyndwood, in the reign of Henry the Sixth, and by Lord Thurlow, in his decision in *Middleton* v. *Spicer*, in the reign of George the Third. In this case (reported 1 Bro. C. C. 202), no doubt was ever suggested, as to the right of the Crown, in case of intestacy. The great doubt was, whether a trust could be raised for the Crown, by implication, and whether the legacies given to the executors, which would have excluded them from taking the residue, in a contest with next of kin, would have the same effect, in a contest with the Crown.

We consider it, therefore, to be perfectly clear that, at the date of the charters on which the Duchy claim is founded, the right in question was vested in the Crown, as one of its *jura regalia*, and the ques-

tion is, whether, under the terms of these charters, it passed to the Duchy.[1]

The Queen's Advocate (*Sir John Dodson*), *the Solicitor-General* (*Sir David Dundas*), *Mr. Chilton*, Q. C., and *Mr. C. Townsend*, for the Crown.

Mr. Parker, Q. C., *Dr. Jenner*, and *Mr. T. F. Ellis* (*Attorney-General of the Duchy of Lancaster*), for the Duchy.

GOODS OF FELL.

COURT OF PROBATE. 1861.

[*Reported* 2 *Sw. & Tr.* 126.]

WILLIAM WALKER FELL, late of No. 8, Camden Street, in the parish of St. Pancras, died on the 3d of May, 1860, leaving Sarah Fell, his widow, and Mr. John Fell, his natural and lawful father (the only persons entitled in distribution to his personal effects), him surviving.

The deceased left behind him a testamentary paper dated the 2d of May, 1860, of which he appointed his wife and Mr. King executors.

The court on motion refused to grant probate of this paper, on the ground of its having been unduly executed.

The widow was anxious that the deceased's father should take out administration to the estate. She had executed a proxy of renunciation and consent. She was, however, unable to execute a renunciation in the usual form, which contains a recital that the renunciant has not intermeddled in the estate of the deceased, inasmuch as she had intermeddled on the supposition that she was an executor, and had a right to do so.

Robert Pritchard moved for a grant of administration of the estate of the deceased to be decreed to Mr. John Fell, as his natural and lawful father. The widow was generally preferred; but if she waived her right, the next of kin might come in and take the grant. The only objection here was, that she had intermeddled in the estate, and so could not renounce in the usual form. If an executor intermeddled in the estate, the court would not allow him to renounce, but compel him to take probate.

SIR C. CRESSWELL. But if a person entitled to the grant has intermeddled in the estate, can the court compel him to take out administration?

Robert Pritchard. No; I suppose not. The administrator is merely an officer of the court.

SIR C. CRESSWELL. I think you may take the grant. Mrs. Fell may renounce without declaring that she has not intermeddled in the

[1] The opinion on this point is omitted. The court held that the right did pass to the Duchy.

estate. There is no doubt that she intermeddled on the supposition that she herself was one of the executors. *Motion granted.*[1]

NOTE. — "I apprehend that a creditor, except by the practice of the court, has no right to the administration of the estate of a party deceased; he has no right by the Statute: he is the appointee of the court; and I do not know, if circumstances showed that the creditor was not a proper person, that the court might not appoint another person." — *Per* SIR HERBERT JENNER, in *Menzies* v. *Pulbrook*, 2 Curt. 845, 850 (1841); 1 Wms. Exec. (8th ed.) 451.

On the powers of an administrator *durante minore ætate*, see *In re Robinson*, 3 L. R. Ir. 429 (1879); *In re Cope*, 16 Ch. D. 49 (1880).

BONDS. ST. 22 & 23 CAR. II. (1670) c. 10, §§ 1–3. Be it enacted by the King's most excellent Majesty, with the advice and consent of the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the authority of the same, that all ordinaries, as well the judges of the prerogative courts of Canterbury and York for the time being, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may upon their respective granting and committing of administration of the goods of persons dying intestate, after the 1st day of June one thousand six hundred seventy and one, of the respective person or persons to whom any administration is to be committed, take sufficient bonds with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following, *mutatis mutandis*, *viz.*,

§ 2. The condition of this obligation is such, that if the within bounden A. B. administrator of all and singular the goods, chattels and credits of C. D. deceased, do make or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hands, possession or knowledge of him the said A. B., or into the hands and possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the registry of court, at or before the day of next ensuing; (2) and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased at the time of his death, which at any time after shall come to the hands or possession of the said A. B., or into the hands and possession of any other person or persons for him, do well and truly administer according to law; (3) and further do make or cause to be made, a true and just account of his said administration, at or before the day of . And all the rest and residue of the said goods, chattels and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the judge or judges for the time being of the said court, shall deliver and pay unto such person or persons respectively, as the said judge or judges by his or their decree or sentence, pursuant to the true intent and meaning of this Act, shall limit and appoint. (4) And if it shall hereafter appear, that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said court, making request to have it allowed and approved accordingly, if the said A. B. within-bounden, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said court; then this obligation to be void and of none effect, or else to remain in full force and virtue.

§ 3. Which bonds are hereby declared and enacted to be good to all intents and purposes, and pleadable in any courts of justice. . . .

See *Archbishop of Canterbury* v. *Tappen*, 8 B. & C. 151 (1828); *Same* v. *Robertson*, 1 C. & M. 690 (1833); 1 Woerner, Amer. Law of Adm., §§ 249–260.

In most of the United States, executors also are required to give bonds, 1 Woerner, § 250.

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[1] And so *Ackerley* v. *Oldham*, 1 Phillim. 248 (1811).

SECTION V.

EFFECT OF PROBATE.

NOELL *v.* WELLS.

KING'S BENCH. 1668.

[*Reported* 1 *Lev.* 235.]

DEBT by the plaintiff, as executrix to her husband: the defendant pleads *Never executrix;* and on a trial the plaintiff produced the probate of the will in evidence: the defendant said, that the will was not a true, but a forged will. And the *Chief Justice*, before whom it was tried, was of opinion, that he could not give such evidence directly contrary to the seal of the ordinary in a matter within his jurisdiction, whereupon a case was made for the opinion of the court, and a verdict taken for the plaintiff; but judgment to be stayed, if the court should be of opinion, that such evidence might be given; and upon motion the whole COURT held, that it could not be given. But evidence may be given, that the seal was forged or repealed, or that there were *bona notabilia;* for those confess and avoid the seal. But he cannot give in evidence that another was executor; or that the testator was *non compos mentis*, for those falsify the proceedings of the ordinary in cases of which he is judge. But those are to be remedied by appeal.

NOTE. — At common law probate had no effect on title to freehold land. When copyhold land was surrendered to the use of the tenant's will, it would seem that probate was no evidence of the existence of a will, as the judgments of the ecclesiastical courts bound only those who claimed an interest in the personalty. See 1 Wms. Exec. (8th ed.), 568, and cases cited.

PLUME *v.* BEALE.

CHANCERY. 1717.

[*Reported* 1 *P. Wms.* 388.]

A BILL was brought by the executor of Doctor Plume, to be relieved against a legacy of £100, claimed by the defendant Beale, as given by the will of Doctor Plume.

The defendant Beale was no relation to the doctor, nor had done him any service, saving that now and then she had, during his illness, brought him some few slight cordials, in return for which, the doctor had ordered her a piece of plate.

This £100 legacy was interlined in the will by a different hand, and supposed to have been done by the defendant herself, when she was left in the room alone with the corpse, in which room the will was left.

But forasmuch as the will was proved by the plaintiff the executor in a proper court, that had a proper jurisdiction, (it relating only to a personal estate,) and more especially, for that the executor might have proved the will in the spiritual court, with a particular reservation as to this legacy, the Court [Lord Cowper, C.] said, his remedy must be there, and dismissed the bill with costs.[1]

SECTION VI.

REVOCATION OF PROBATE AND ADMINISTRATION.

BAXTER AND BALE'S CASE.

Common Pleas. 1587.

[*Reported* 1 *Leon.* 90.]

Baxter brought debt upon a bond as executor of I. against Bale; who pleaded that the plaintiff after the death of the testator was cited to appear before the ordinary or his commissary to prove the will of the said I., and at the day of his appearance he made default, upon which the ordinary committed letters of administration to the defendant, by force of which he did administer, so the debt is extinct, &c., but the whole Court was clear of opinion, that the debt was not extinct, for now by the probate of the will the administration is defeated, and although the executor made default at the day which he had by the citation before the ordinary, yet thereby he is not absolutely debarred, but that he may resort to the proving of the will whensoever he pleaseth; but if he had appeared and renounced the executorship it had been otherwise; and the debt is not extinct by the administration in the mean time.[2]

[1] See *Allen* v. *M'Pherson*, 1 H. L. C. 191 (1847); *Meluish* v. *Milton*, 3 Ch. Div. 27 (1876); *Case of Broderick's Will*, 21 Wall. 503 (1874).

On the right of the court of construction to look at the original will, see 1 Wms. Exec. (8th ed., 74–577.

In most of the United States probate is conclusive as to realty as well as to personalty. In New York, however, and some other States, it is conclusive as to personalty, but only *prima facie* evidence as to realty. 1 Woerner, Amer. Law of Adm. § 228.

[2] In *Graysbrook* v. *Fox*, Plowd. 275 (C. B., 1565), the plaintiff, executor of the will of Kene, brought detinue for sundry chattels against the defendant. The defendant pleaded that Kene died possessed of the said chattels; that administration of his goods was granted to his son; and that before the probate of Kene's

PACKMAN'S CASE.

QUEEN'S BENCH. 1595.

[*Reported* 6 *Co.* 18 *b.*]

WILSON brought an action on the case on trover against Packman, and the case was such; a man died intestate, and the ordinary committed administration to a stranger, and afterwards the next of kin of the intestate sued a citation in the spiritual court, to have it repealed; pending which suit, the administrator, to defeat the plaintiff in the spiritual court of the effect of his suit, sold the goods of the intestate to the defendant: and afterwards the letters of administration are revoked by sentence, and the first sentence annulled and made void,

will, the son sold the said chattels to the defendant. The plaintiff demurred. DYER, C. J., and WALSH, J. (WESTON, J., *dissentiente*), sustained the demurrer.

WALSH, J., said: "That the seal of the ordinary put to the administration is but a matter of fact, which is not any estoppel for the time, nor shall it force the executor to sue in the spiritual court to repeal it, but he shall avoid it by plea, or by taking the goods from the administrator, or by some other matter of fact as occasion shall offer. And to prove this he cited the first case in Trin. 44 Ed. 3, where one brought a writ of debt against another as administrator, and declared that the debtor died intestate, and that the ordinary deputed the defendant to be administrator, and he showed the same in certainty, and the opinion of the court there was, that he ought to do so; and the defendant said, that the deceased made his testament, and constituted the defendant and another his executors, and he demanded judgment of the writ, and showed forth the testament proving his plea, and the plaintiff offered to aver that the party died intestate, and the defendant said that he should not be received to this averment against the testament which is proved before the ordinary, and is under the seal of the ordinary, *sed non allocatur;* wherefore the plaintiff had the averment, and it was tried *per pais.* So that the seal of the ordinary to the probate of the testament could not deprive the plaintiff of his averment, but that he should have it, and try it *per pais.*"

The same judge also said: "If the defendant here had averred that the administrator had aliened the goods to him for a certain sum, and had employed the money in discharge of the funeral, or of the debts of the deceased, or about other things which an executor should be forced to do, there the sale for such purposes should not be avoided, but should remain indefeasible; and the reason is, because by the commission of the administration to him by the ordinary, who was ignorant of the testament, he has a color of authority, though it is not a rightful one, and he that has the right suffers no disadvantage although he be bound by the act of the administrator, for it is no more than he himself was compellable to do, and the administrator having done that which the executor himself was obliged to do, his act shall be allowed good, because the executor himself is thereby freed and excused from the trouble of doing it. And so inasmuch as the administrator was compellable to do it, (for if he was sued for a thing which ought to be done, he could not disable or discharge himself for the time,) it is reasonable, and no detriment to any one, that the thing done should remain stable and firm without impeachment. And hereupon he cited the case of *Sands and Peckham*, in 4 H. 7, where Peckham, claiming to be executor to one who was dead by a false testament supposed to be made by the testator, had got this false testament to be allowed, upon default of Sands, who claimed to be executor by a latter will, before a certain person appointed by a delegacy, and the will exhibited by Peckham was proved,

and afterwards administration was committed to the plaintiff. And it was resolved that the action did not lie; and thereupon the plaintiff discontinued his action: and in this case a difference was taken between this suit by citation, which is to countermand or revoke the former letters of administration, and an appeal, which always is to reverse a former sentence, for the appeal doth suspend the former sentence; otherwise of a citation: and in this case forasmuch as the first administrator had the absolute property of the goods in him, without question he might give them to whom he pleased. And although the letters of administration be afterwards countermanded, and revoked, yet that cannot defeat the gift. But if the gift be by covin, it shall be void by the Statute of 13 Eliz. against a creditor, but it remains good against the second administrator; and if an administrator waste the goods, and afterwards administration is committed to another, yet any debtee shall charge him in debt; and if he pleads the last administration

and afterwards Sands sued out another delegacy to another, who awarded that the testament exhibited by Sands was true, and that he was executor, and that the said testament whereby Peckham claimed should be void, and upon this Sands sued an action of debt against Peckham for 40 marks, which he was bound to the testator to pay, and Peckham showed the allowance of his testament *ut supra*, and that during the time that his testament was in force he paid the 40 marks to one of whom the testator had received so much for usury; and it was adjudged no plea, because he was not bound by law to repay the usury, for it is but a thing of conscience, which the law will not compel him to pay. But there it is held, that although he was not executor of right but of wrong, yet if he had paid any debt due by specialty, or other thing, which the law will force the executor to pay, the true executor should have been bound by it, and should have been obliged to allow it, because the other was compellable to pay it, and the true executor had no prejudice by it, forasmuch as he himself should have been bound to pay it. And it is there put, that if the bailiff of a manor pays the debts of his master due by specialty or contract, he shall not be allowed for it in his account, because he was not compellable to pay them; but if he pays quit-rents issuing out of the manor, he shall be allowed for it in his account, because it belongs to his office to pay them. And so here if the administrator had aliened the goods specified in the count to pay the funeral or debts, the sale had been good and indefeasible; *quod alii duo Justiciarii concesserunt.* And upon this Dyer cited the case in 12 H. 7, where the Dean and Chapter of Paul's brought an action of trespass against one for cutting down great trees, and the defendant justified as their bailiff of a manor, in which there was a park enclosed with pale from time beyond the memory of man, and that he cut down the trees for the necessary enclosure of the park with pale, and applied them to that use; and the opinion of the court was that he might justify, for it belongs to his office to repair or maintain the park or edifices of the manor in the same condition as they have always been, but he cannot make a new pale, or new houses, or anything in other manner than they have used to be, but to maintain and keep them in the same form is a part of his office, and he shall be allowed for the same. So in the principal case, if the defendant had shown that the sale was made to him by the administrator in discharge of anything which he had been compellable to do, the sale should not have been avoided; but he has not shown any such matter, nor has he taken any such averment, and therefore it cannot be taken by the plea that it was applied to any such purpose, for which cause the plea in bar is not good, and the plaintiff ought to recover. And (as I heard) ANTHONY BROWN, J., afterwards declared to them that he was of the same opinion, wherefore judgment was given for the plaintiff the same term."

See *Abram* v. *Cunningham*, 2 Lev. 182 (1677).

committed to another, the other may reply, that before the second administration committed, he had wasted the goods. *Vide* 17 Eliz. Dy. 339, the like case, and 34 H. 6. 14 a, b. Administration may be granted on condition, and it was holden in such case, if such administrator, before the condition broke, gives away the intestate's goods, and afterwards the condition is broke, yet the gift stands good. And observe, reader, a manifest difference between this case and the case of 17 Eliz. For in our case the administration granted was lawful, and the gift also lawful, and the donee claimed in under the first administration, which the second administrator did intend to countermand and revoke; but in the case of 17 Eliz. the second administrator (who obtained the second administration by covin had with the defendant in the action without any recital of the first administration) did release to the defendant by covin to bar the plaintiff of his execution: it is there adjudged, that the said second letters of administration being by sentence reversed, and declared to be void, the defendant who was party to the covin being in execution should not have an *audita querela*. But that is not to be likened to our case, for there the defendant claimed by the second administration, which is declared to be void, and the first always in force, so that the second administration was never lawful; but in our case the first administration was lawful, until it was countermanded, and so a difference.[1]

SEMINE *v.* SEMINE.

King's Bench. 1673.

[*Reported* 2 *Lev.* 90.]

Administration was granted, and the administrator by virtue thereof being possessed of a term, made a lease of the land, and after was a citation to repeal the administration, but it was affirmed; upon which sentence of affirmation an appeal was sued, and the sentence of affirmation thereby repealed, and the first administration repealed, and administration granted to another. And by Hale and the whole court, this new administrator shall not avoid the lease of the first administrator, for this is only a repeal of the sentence in the citation, and so is in the nature of a suit on the citation; and so it is all one as if the first administration had been avoided in the suit upon the citation, and not as if the appeal had originally been brought upon the first administration, which thereby had been totally annulled. 6 Co., *Packman's Case*.[2]

[1] See *Blackborough* v. *Davis*, 1 Salk. 38 (1701).

[2] See *Hughes* v. *Burriss*, 85 Mo. 660 (1885).

ALLEN *v.* DUNDAS.

KING'S BENCH. 1789.

[*Reported* 3 *T. R.* 125.]

THIS was an action on the case for money had and received to the use of the intestate, and to the use of the plaintiff as administrator: to which the defendant pleaded the general issue. And on the trial a special verdict was found, stating in substance as follows. The defendant, as treasurer of the navy, was indebted to the intestate in his lifetime in £58 13*s.* 6*d.* for money had and received to his use. Priestman died on the 2d of June 1784: on the 13th of August 1785, one Robert Brown proved in the Prerogative Court of the Archbishop of Canterbury, a forged paper writing, dated the 18th of May 1784, purporting to be the last will of Priestman, otherwise Handy; whereby he was supposed to have appointed Brown the sole executor thereof; and a probate of that supposed will issued in due form of law, under the seal of that court, on the same day, in favor of Brown. The defendant, not knowing the will to have been forged, and believing Brown to be the rightful executor, on Brown's request paid him £58 13*s.* 6*d.*, being the whole balance then due from the defendant to Priestman. On the 21st of July 1787, Brown was called by citation, at the suit of John Priestman the father, and next of kin of the deceased, in the Prerogative Court of the Archbishop of Canterbury, touching the validity of such supposed will; and such proceedings were thereupon had in that court, that the will and probate were declared null and void; that Thomas Priestman died intestate; and that John Priestman the father was his next of kin. And on the 31st of March 1788, letters of administration of the goods, &c. of Thomas Priestman were granted by that court in due form of law to the plaintiff, as attorney of John Priestman. But whether, &c.

Shepherd, for the plaintiff.

Baldwin, for the defendant.

ASHHURST, J. I am of opinion that the plaintiff has no right to call on the defendant to pay this money a second time, which was paid to a person who had at that time a legal authority to receive it. It is admitted, that if he had made this payment under the coercion of a suit in a court of law, he would have been protected against any other demand for it: but I think that makes no difference. For as the party to whom the payment was made had such authority as could not be questioned at the time, and such as a court of law would have been bound to enforce, the defendant was not obliged to wait for a suit, when he knew that no defence could be made to it: this therefore cannot be called a voluntary payment. This is different from payments under forged bonds or bills of exchange; for there the party is to exercise his own judgment, and acts at his peril: a payment in such a case

is a voluntary act, though perhaps the party is not guilty of any negligence in point of fact. But here the defendant acted under the authority of a court of law; every person is bound to pay deference to a judicial act of a court having competent jurisdiction. Here the spiritual court had jurisdiction over the subject matter; and every person was bound to give credit to the probate till it was vacated. The case of a probate of a supposed will during the life of the party may be distinguished from the present; because during his life the ecclesiastical court has no jurisdiction, nor can they inquire who is his representative; but when the party is dead, it is within their jurisdiction. Besides, the distinction taken by the defendant's counsel between cases where a will is set aside on an appeal, or on a citation, seems to have some foundation: in the former the original sentence is as if it had never existed; in the latter, the will is only repealed, and all acts under it till the repeal are good. But the foundation of my opinion is, that every person is bound by the judicial acts of a court having competent authority: and during the existence of such judicial act, the law will protect every person obeying it.

BULLER, J. The first question to be considered is, What is the effect of a probate? It has been contended by the plaintiff's counsel, first, that it is not a judicial act; and 2dly, that it is not conclusive. But I am most clearly of opinion that it is a judicial act; for the ecclesiastical court may hear and examine the parties on the different sides, whether a will be or be not properly made; that is the only court which can pronounce whether or not the will be good. And the courts of common law have no jurisdiction over the subject. Secondly, the probate is conclusive till it be repealed: and no court of common law can admit evidence to impeach it. Then this case was compared to a probate of a supposed will of a living person; but in such a case the ecclesiastical court have no jurisdiction, and the probate can have no effect: their jurisdiction is only to grant probates of the wills of dead persons. The distinction in this respect is this; if they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places: but where they have no jurisdiction, their whole proceedings are a nullity. As to the case in Com. 150, I think it carries its own death-wound on the face of it. It is an anonymous case, and is said to have been determined on the 5th of Ann. In the replication in that case, there is a traverse that the testator made such will by which A. B. was appointed executor. It is rightly admitted that such a traverse cannot be supported. The courts of common law cannot try whether it be a good will or not, for that depends on ecclesiastical law. The Chief Justice, in giving the judgment of the court, begins with giving as his reasons, "that an executor derives all his authority from the testator himself; and that he of himself, as being executor, without anything more, has the power of disposing of the testator's estate. True it is, before an action brought a probate is necessary, but that is only requisite to ascertain the court that the plaintiff is executor." From this admission it

appears that there are no means of ascertaining who is executor but by applying to the ecclesiastical court for a probate: so that the reason destroys itself. Then he proceeds to point out the difference between a citation and an appeal. Now if that distinction extend to the case of executors as well as administrators, it will decide the present case. But he goes on to add in that case, "but it is otherwise in the case of an executor; for the probate of the will gives no authority at all to him." In that I differ from him; because an executor has an authority which a court of common law cannot dispute. The Chief Justice afterwards goes on to say, "that that case was not like the case of an officer who officiated without legal authority, as the deputy of the deputy of a steward, &c.; for rightful acts done by him are good, for he is an officer *de facto*, and in the immediate and open execution of his office. And the parties did not know whether he had authority or not." That is just the present case; for here there was an executor *de facto*, who had obtained a probate; and the defendant neither knew or could tell whether he was rightful executor or not, further than he was informed by the probate, which he could not dispute. Then the Chief Justice resorts to the argument of inconvenience, if a tortious executor should be permitted to dispose of the right and interest of a rightful executor. But I think that the inconvenience is clearly the other way; because, if there be a rightful executor, and he does not come forward, he is guilty of *laches*. Suppose such an one were to lay by for a number of years, and in the meantime all the debts were to be collected by another person who had obtained a probate as executor: those payments ought to be protected; for during all that time the debtors could not controvert his authority; and it is admitted that if actions had been brought in such cases, the debtors coud not have made any defence. Another thing to be observed in the case in Comyns is, that it was decided on the authority of a case in Ro. Abr. 919, which is there said was never denied. From that circumstance I am inclined to think it passed without much consideration; for the doctrine in Ro. Abr. is contradicted in 2 Lev. 90, and 1 Lev. 158 and 236. In the last of those cases, the objection was first made at *Nisi Prius:* but the point was reserved for the opinion of the court on a case (which shows that the practice of granting cases is not of very modern date, for that was in Charles the Second's time); and it was there resolved by the court that, on the plea of *ne unques* executor, evidence might be given that the seal of the ordinary was forged, or that there were *bona notabilia;* for they confess and avoid the seal. But they also held that evidence, that another, and not the plaintiff, was executor, or that the testator was *non compos mentis*, or that the will was forged, could not be admitted; for that would be to falsify the proceedings of the ordinary in cases of which he is judge. It seems therefore strange that the Chief Justice should have said in that case that the case in Ro. Abr. had never been doubted; because these cases determined the reverse of the doctrine there contained. Then as to the traverse in the case in Comyns, it is

impossible to support it. The Chief Justice says that "the traverse is good; for whether a will or no will is a question triable by a jury; and the reason is, because the spiritual court had not the original jurisdiction of the probate of wills, and because as to trial the temporal courts have *quasi* a concurrent jurisdiction." Now this reason undoubtedly fails. The concluding reason there given is, "that the probate of a will concludes a person from saying there was no such will; but notwithstanding this matter may be brought to trial; for the producing a will under probate is only evidence that there was such a will. And though it is evidence of so strong a nature that no evidence shall be admitted against it, yet to plead that such a will was proved is no reason why this matter should not be tried." This reason is directly contradictory to itself; for, first, he says that the probate is only evidence of the will, and that it may be tried; and yet he adds, that it is conclusive, and that no evidence can be admitted against it. Therefore I think this case is destructive of itself. Another head of argument by the plaintiff's counsel was, that the payment in this case under the probate was not a compulsory one, and a case of bankruptcy was alluded to. But a determination on the bankrupt laws cannot govern the court in deciding this question. Those cases turn on a fraudulent preference given to one creditor over another: but even there the courts have never proceeded on the idea that a judgment is necessary to enforce payment; a threat is sufficient. And the question in those cases is, whether the payment under the circumstances be fair, or with a view to defraud the rest of the creditors.

Grose, J. No doubt could ever have been entertained on this subject, had it not been for the case in Ro. Abr. and Comyns; which struck me at first as being very strong cases to the point for which they were cited: but I am satisfied, by what has been said by my Brother Buller, that they cannot be law. The case in Comyns seems to be grounded on a false principle, namely, that the probate of a will gives no authority to the executor. But I think it does, and so much so that it cannot be traversed or denied. Gilb. Eq. Cas. 207, 8. Then the payment to the executor in this case was made under the judicial act of a court having competent jurisdiction on the subject, which could not be disputed. And therefore it is not like a payment under a forged bill of exchange or bond, for this was made under the authority of the probate, and not of the will. It has been said that there is a difference between a repeal of letters testamentary on appeal or on citation: however that may be, the ground of my opinion is that the law, which is founded on wise and sound principles, will never compel any person to pay a sum of money a second time, which he has once paid under the sanction of a court having competent jurisdiction.

Judgment for the defendant.[1]

[1] See *Thompson* v. *Samson*, 64 Cal. 330 (1883).

WOOLLEY *v.* CLARK.

KING'S BENCH. 1822.

[*Reported* 5 *B. & Ald.* 744.]

TROVER for stock in trade and household goods. In the first count the goods were laid to be the property of the testator; in the second, of the plaintiff, as executrix. Plea, *Not guilty*. At the trial, before *Abbott*, C. J., at the Middlesex sittings after last Michaelmas Term, the following facts appeared in evidence: the testator died on the 16th June, 1819; at that time the defendant, Clark, had in his possession a will of the testator, bearing date the 29th April in that year, by which he was appointed executor. This will was proved on the 23d June, 1819, and administration was granted to Clark, and he directed the sale of the several articles mentioned in the declaration, which were sold by the other defendant, an auctioneer, on the 30th July, 1819. The testator had made another will on the 12th June, 1819, by which he appointed the plaintiff his executrix; and it was proved that the defendants had notice of this second will previously to the sale of the goods. The second will was proved on the 21st May, 1821 (the probate of the first will, under which the defendants acted, having been revoked upon citation), and administration was granted to the plaintiff. It was contended, on the part of the defendant, that the revocation of the probate of the first will did not avoid all the mesne acts, but that the defendants might show due administration of the assets to the amount of the value of the goods. The Lord Chief Justice would not allow the defendants to give evidence of administration of the assets, and the plaintiff obtained a verdict for the full value of the goods. A rule *nisi* having been obtained for a new trial,

Brougham and *Chitty* now showed cause.

The Solicitor-General and *Wightman*, contra.

ABBOTT, C. J. There is a manifest distinction between the case of an administrator and an executor. An administrator derives his title wholly from the ecclesiastical court. He has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant. An executor, on the other hand, derives his title from the will itself, and the property vests in him from the moment of the testator's death. That being so, the property vested in the plaintiff, as executrix, from the time of the death of the testator; and, consequently, the defendants, who had notice of the second will, had no right to sell, and therefore are liable in this action.

BAYLEY and HOLROYD, JJ., concurred.

BEST, J. Where a party obtains a judgment irregularly, which is afterwards set aside for irregularity, he is not justified in acting under

it; but the sheriff is justified. Here, the first probate was irregularly obtained. The party who obtained that probate, therefore, was not justified in selling the goods; but a creditor, who paid him a debt while the letters of administration were unrepealed, would be protected.

Rule discharged.

KITTREDGE *v.* FOLSOM.

Superior Court of Judicature of New Hampshire. 1835.

[*Reported* 8 *N. H.* 98.]

Parker, J.[1] Upon the fourth plea, with the replication and rejoinder thereto, several questions have arisen. The plea alleges that the original administration, as executor of the will of Benjamin Kittredge, was granted to the defendant, 15th of February, 1832, and not before, and that the suit of the plaintiff was commenced before the expiration of one year from that time. To this, the plaintiff replies, that the defendant was appointed, by the judge of probate, administrator of said estate, March 17, 1830, and took upon himself that trust — that said appointment was the first and original grant of administration, and that the suit was not commenced before the expiration of one year from said 17th of March, 1830. The rejoinder admits these facts, but sets forth that this was a grant of administration as upon an intestate estate; that afterwards, an instrument purporting to be the last will of said Benjamin Kittredge, and purporting a disposition of his whole estate, was presented May 6, 1830, for probate, before the judge of probate; that the same was fully proved and approved in the Supreme Court of Probate, at January Term, 1832; that the plaintiff was named executor in said will, and on his refusal, the defendant, — and that on the plaintiff's refusal, administration under the will, with letters testamentary on said estate as a testate estate, was granted to the defendant, which administration is the same as that set forth in his fourth plea.

The first question raised by the demurrer is upon the sufficiency of this rejoinder. The Statute, as we have seen, provides that no action, for a cause of action against the deceased, shall be sustained against an executor or administrator, if commenced within one year after the original grant of administration. This suit was commenced June 2, 1832. If, therefore, the administration under the will granted to the defendant on the 15th of February, 1832, is to be regarded as the original grant of administration in this case, the action was in fact commenced before the period when it could rightfully have been instituted; but if the administration taken by the defendant March 17, 1830, may be regarded as an original administration, the rejoinder is insufficient.

[1] Part of the opinion only is here given.

That the latter was the first actual administration is apparent; and unless that administration was entirely void, by reason of the existence of the will which has since been proved, there seems to be no objection to holding it an original administration for the purpose of this suit.

The Statute requires the exhibition of the demand to the executor or administrator against whom the suit is commenced, before its institution; but the limitation of the term of one year in which it may not be commenced does not date from the appointment of the administrator against whom the suit is instituted, but from the time of the original grant of administration, to whomsoever it may be made. It can be of no consequence, therefore, that the defendant has received an authority to administer the estate as executor, under the will, within a year prior to the time when the suit was instituted, if his appointment as administrator, prior to that time, was of such validity that it can be regarded as an original grant of administration upon the estate.

It is admitted that the question is, whether the administration granted to the defendant, as upon an intestate estate, was or was not a nullity; and it is contended that it was wholly void, and authorities are cited to show that all acts done under it are entirely void, and of no effect.

The law is laid down in 1 Williams on Executors, 367, that if administration be granted on the concealment of a will, and afterwards a will appear, inasmuch as the grant was void from its commencement, all acts performed by the administrator in that character shall be equally void; and for this the case of *Abram* v. *Cunningham,* reported 2 Lev. 182, T. Jones, 72, and in several other books, is cited.

But in the next page of the same writer it is said, "It should seem, however, that as between the rightful representative, and the person to whom the executor or administrator under a void probate or grant of letters has aliened the effects of the deceased, the act of alienation, *if done in due course of administration,* shall not be void. Thus in the case of *Graysbrook* v. *Fox*, above mentioned, it was laid down by the court that if the sale had been made to discharge funeral expenses, or debts which the executor or administrator was compellable to pay, the sale would have been indefeasible forever." 1 Williams, 368: and so is the case, *vide* 1 Plowd. 282.

Now, how anything can be done in due course of administration, where the administration and everything done under it is merely and wholly void, it is difficult to discover. The due course of that which had no rightful existence, but was a mere nullity, would seem to be the due course of wrong, or nonentity, and presents a solecism somewhat worse than two original grants of administration on the same estate. The position, also, that a purchaser can obtain an indefeasible title from the void act of one whose supposed authority is a mere nullity, seems to have more of legerdemain than of law in it.

Again — It is said in the same author, "It must be observed that whether the probate or letters of administration be void or voidable, if the grant be by a court of competent jurisdiction, a *bona fide* payment

to the executor or administrator, of a debt due to the estate, will be a legal discharge to the debtor." 1 Williams, 370. That is to say, that the payment of a debt to him who has no authority to receive it, and whose act in receiving it is a void act, is a good discharge to him who owed the debt.

In *Allen* v. *Dundas*, 3 D. & E. 125, the court held that payment to an executor who had obtained probate of a forged will, was a discharge to the debtor, notwithstanding the probate was afterwards avoided in the ecclesiastical court; on the principle that the debtor could not have controverted the title of the executor so long as the probate was unrepealed, and might well pay when he could make no defence. See also 8 East, 189; Bac. Abr., Executors, &c., E. 13.

So where administration is granted, and afterwards there appears to be an executor, if the administrator has paid debts, legacies, or funeral expenses, he may retain, because he was compelled to pay; and the true executor has no prejudice, for he would have been bound to pay them. And in *Graysbrook* v. *Fox*, Weston, Justice, was of opinion that the sale of the goods by the administrator was indefeasible, although it was not shown that they were sold to discharge debts or funeral expenses. 1 Plowd. 279.

There is evidently an inaccuracy in the use of the term *void*, in many instances in the books, upon this and other subjects; and the attempt to reconcile all the authorities upon the matter now under consideration must be in vain. An administration granted by the competent authority, upon a proper case made, can with no propriety be termed a nullity, and all the acts of the administrator held to be void, notwithstanding a will may afterwards appear and the administration be revoked. 6 Co. 19, *Packman's Case*; 2 Lev. 90, *Semine* v. *Semine*. The acts of such administrator must be quite as valid as those of an executor under a will which has been revoked by the testator. The grant of administration confers an existing authority, which cannot be resisted or disregarded until the will appears. 1 Lev. 235, *Noell* v. *Wells*. The administrator in such case comes into his office by color of an authority. Plowd. 282. He is administrator *de facto*, and his acts, done in due course of administration, must be valid, at least so far as third persons are concerned. 7 N. H. R. 131. A distribution to those not entitled may perhaps form an exception. The circumstance that an executor is said to derive his authority from the testator, cannot affect the principle; for until it appears that the deceased has exercised the power, and made an appointment, the judge of probate has the right, and is bound to grant administration. The attempt, therefore, to draw a distinction between a grant of administration in derogation of the right of the executor, and one in derogation of the right of the next of kin, holding the former void, and the latter only voidable, is not well sustained. The judge of probate has jurisdiction to allow a will, if one is presented, and if not, to grant administration. He may well grant the latter when there is no evidence that the former has any existence, and his act in

doing so is not to be held entirely void, because in derogation of the right of an executor, who has perhaps occasioned the act by his own neglect.

It is said that there are many things which an executor may do before probate. 1 Bac. Abr., Executors, &c., E. 14; 3 N. H. R. 517, *Strong* v. *Perkins*. But where an administration has been granted, an individual, by virtue of being named executor in a paper purporting to be a will, cannot control the acts of such administrator except by a probate of the will. In no other way can it appear that the administration is not well granted; for the will may be entirely ineffectual by reason of a want of sanity in the testator, or because it was procured by fraud, or has been revoked, &c.

And it may well deserve consideration, whether under our Statute of July 2, 1822 (which provides that no person shall intermeddle with the estate of any person deceased, or act as the executor or administrator thereof, or be considered as having that trust, until he shall have given bond to the judge of probate), an individual named executor can do any act as such until after the probate of the will. The bonds are to be given to the judge upon the probate of the instrument.

The defendant in this case, under his first appointment as administrator might have commenced a suit upon a demand due to the estate, and have prosecuted it to judgment if the time had permitted, and no defence could have been made to it. The production of a will without probate would have been of no avail. 16 Mass. R. 442, *Dublin* v. *Chadbourne;* 1 Pick. 547, *Laughton* v. *Atkins;* 1 Pick. 114, *Shumway* v. *Holbrook;* 4 D. & E. 260, *The King* v. *Netherseal.*

So a suit might have been commenced against the defendant as administrator, on the lapse of a year; and to such suit the existence of a will without probate, or a plea that he was not rightful administrator, would have been no bar.

Payment, then, made to him, *bona fide*, must operate as a discharge of the debtor; and payment by him of a debt which the deceased owed, would be a valid act, for which he might retain, if the estate was solvent.

How far notice of a will might have afterwards affected his liability to a third person who was rightful executor, it is not necessary now to consider. 5 B. & Ald. 744, *Woolley* v. *Clark.*

Had this suit been commenced against him as administrator after the lapse of a year without the production of the will, he must have plead to the merits. Perhaps had the will in such case been proved before trial, and a third person been executor, he might have plead the matter in bar of the further maintenance of the suit.

But we see no sound principle upon which he could have done this, had he himself, being the executor, taken letters testamentary during the pendency of the suit. There would in such case be no sufficient reason why the suit, which had been well commenced, should be defeated, in order that another should be instituted against him for the

same cause, describing him as executor instead of administrator. 5 N. H. R. 342, *Giles* v. *Churchill.* He might have paid as administrator, and been protected. He might continue the defence, if he thought proper, under his character as executor.

So we think a suit commenced by him as administrator before probate, could not have been defeated by a plea that since the last continuance he had proved the will, and been accredited as executor instead of administrator. It would be a mere change of his title of office, so far as the prosecution of such suit was concerned. It would be otherwise in case a third person had been appointed executor.

We have not, therefore, laid out of consideration the circumstance that the same individual who took the administration is the rightful executor, because his acts might in our opinion be continued; and no doubt all he had done under the administration, not in conflict with the provisions of the will, may be carried into the account of his administration, and allowed in the probate court, as if he had acted as executor in the first instance.

Upon the facts in this case, then, we hold that the grant of the administration on the 17th of March, 1830, was the original grant of administration within the terms of the Statute. Whether we must have arrived at a different conclusion had that grant been to a third person, and the suit commenced against the defendant before the expiration of a year from the probate of the will, we do not determine. The fact that the acts of such administrator, not in derogation of the provisions of the will, must be held valid as far as third persons were concerned, would certainly tend to give such an administration the character of an original administration within the meaning of the Act. The circumstance, however, that the executor might not have had knowledge of the condition of the estate, or have been able to collect the assets so as to make payment, must be weighed in such case, and upon this we give no opinion.

Porter, Bell, and *Pillsbury*, for the plaintiff.

C. H. Atherton, *Bartlett*, and *Betton*, for the defendant.

NOTE. — In *Waters* v. *Stickney*, 12 Allen, 1 (1866), the Probate Court in 1851 approved a will. In 1865, a petition was presented to the court alleging that there was also a codicil, proof of which had been inadvertently omitted. The court decreed that the will already proved and the codicil should be approved and allowed as the last will of the deceased. The decree was affirmed on appeal. But cf. *Besancon* v. *Brownson*, 39 Mich. 388 (1878).

CHAPTER VII.

ESTATE OF AN EXECUTOR OR ADMINISTRATOR.

SECTION I.

TIME WHEN THE ESTATE VESTS.

MIDDLETON'S CASE.

COMMON PLEAS. 1603.

[*Reported* 5 *Co.* 28 *b.*]

IT was adjudged in the Common Pleas between Middleton and Rimot, that an executor before probate might release an action, although before probate he could not have an action, for the right of the action is in him; but if A. releases and afterwards takes administration, it should not bar him, for the right of the action was not in him at the time of the release. *Vide* 18 H. 6, 43 b. *Griesbrook's Case*, Plow. Com. 277, 278; 21 E. 4, 24 a. Two executors prove the will, the third refuses, yet he may release. Lit. 177. If a man be bound to pay a sum at a day to come, a release of all actions before the day bars it, yet before the day he cannot have an action of debt; and so the opinion of SIR THOMAS GAWDY in the case before was now adjudged.[1]

[1] "For St. Paul says, 'a testament is confirmed by death,' so that by his definition, and by our law also, it is a testament when the testator is dead, and the executors named are executors presently and before the probate of the testament, for the probate is but a confirmation and allowance of that which the testator has done. For the spiritual court men have divers terms, as *insinuation*, which is a surmise that there is such a testament, and *approbation*, which implies that the surmise is tried to be true, and allowed, and in witness thereof the ordinary puts his seal. But before this is done it is a testament, and the executors named are executors, for the death preceding makes it a testament, and by the death the property of the goods which was in the testator, is cast upon and vested in the executors. And they are not called executors in respect only that they actually execute, but in respect that they may execute. And they may execute before probate, and may be sued, although they shall not sue for any duty due to the testator until they have proved the testament, and they may alien or give away the goods, or otherwise dispose of them before probate." — *Per* DYER, C. J., in *Graysbrook* v. *Fox*, Plowd. 275, 280 (1565). Cf. *Wankford* v. *Wankford*, 1 Salk. 299, 301.

An executor may demise leaseholds before probate. *Roe* v. *Summerset*, 2 W. Bl. 692 (1770).

In *Doe* d. *Hornby* v. *Glenn*, 1 A. & E. 49 (1834), it was *held*, that an administrator was not bound by an agreement that he had made as to the estate before taking out letters. LORD DENMAN, C. J., said: "It would be very strong to hold that the lessor of the plaintiff was bound, after he became rightful administrator, by an act of this kind done by him while he was an executor *de son tort*."

LOCKSMITH *v.* CRESWEL.

King's Bench. 1634.

[*Reported* 2 *Roll. Ab.* 399.]

If a man dies possessed of certain goods, and then a stranger takes and converts them to his own use, and then administration is granted to J. S., this administration will relate to the death of the testator, so that J. S. can maintain an action of trover and conversion for this conversion before the administration granted to him. Adjudged Tr. 10 Car. B. R., between *Locksmith* and *Creswel*, this being moved in arrest of judgment after verdict for the plaintiff.[1]

ANONYMOUS.

King's Bench. 1640.

[*Reported* 1 *Roll. Ab.* 917.]

If an executor before probate of the will brings an action of debt on an obligation due to him as executor, but when he declares he shows it to the court approved, it being approved after action brought, yet the action is well brought, because he was executor before probate, although by the law he is not permitted to sue before probate, yet it being proved, the impediment is removed *ab initio*, for he, by showing the will to the court, satisfies the ceremony which the law requires,

[1] So in *Tharpe* v. *Stallwood*, 5 M. & G. 760 (1843), it was *held*, after an elaborate discussion, that an administrator might maintain *trespass* for acts done after the death of the intestate, and before the grant of administration. And see 1 Wms. Exec. (8th ed.) 884, 885.

But in *Crossfield* v. *Such*, 8 Exch. 825 (1853), it was *held* that an administrator could not maintain *detinue* against one who had had possession of his intestate's goods, but had ceased to hold them before the grant of administration.

"As to trespasses with respect to personal chattels, the law undoubtedly establishes a relation for the purposes of justice. Though the title of the administrator to personal chattels accrues only by the grant of administration, it is quite settled that there is a relation to the death of the intestate so as to recover for mesne injuries to them, or for their conversion; otherwise there would be no remedy for the wrong done, and the relation is allowed for that reason: Com. Dig. 'Administration' (B. 10); and, by parity of reasoning, the law ought to give a relation to enable the administrator to recover for mesne injuries to leasehold property; and Lord Ellenborough, in *Rex* v. *The Inhabitants of Horsley*, 8 East, 410, seems to have been of opinion that such relation existed. Whether, in order to bring an action of trespass, he should make an actual entry, his Lordship does not state." — *Per* Parke, B., in *Barnett* v. *Guildford*, 11 Exch. 19, 31 (1855).

But the reversion of a term "is in the executor immediately by the death of the testator," *Prattle* v. *King*, T. Jones, 169 (1681).

which he has done here as the law requires. *Held* by BERKELEY [J.] on a writ of error on such a judgment in the Court of The Marshalsea, where it was so adjudged on a special verdict.[1]

WHITEHALL *v.* SQUIRE.

KING'S BENCH. 1690.

[*Reported* 1 *Salk.* 295.]

IN an action of trover by the plaintiff as administrator of J. M. for a gelding, on not guilty pleaded, the jury found a special verdict, viz. that J. M. was possessed of the gelding, and put him to the defendant to pasture, and died intestate: that, before administration granted, the plaintiff desired the defendant to bury J. M. decently, who accordingly buried him, and laid out £23 therein; whereupon the plaintiff agreed, that the defendant should have the horse in part of satisfaction of funeral charges, and for £13 residue thereof gave him his note; afterwards the plaintiff took out administration, and now brought trover for the horse; and HOLT, C. J., was of opinion, that the action well lay; for that the defendant was a tort executor, and the plaintiff's consent, when he had nothing to do, would not alter the case; for if he had then released, yet he might have taken administration, and brought an action afterwards; but DOLBEN and EYRE, Justices, *contra*, and the defendant had judgment.[2]

[1] "But though he [the executor] may commence an action before probate, yet he cannot indeed go on with the action; for when he comes to declare, he must produce in court the letters testamentary; but now if probate were necessary to make him an executor, he could not bring the action without probate, as is evident in the case of an administrator, in which case there is no right till administration committed; for till then the administrator cannot bring an action; but in the case of an executor, the not proving the will is only an impediment to the action; but the right of action is the same before probate as after; and the reason why an executor cannot go on before probate is for the enforcing of probates, as is said in Hutton, 21, because upon probates there are inventories exhibited and other acts done by the executor, which are for the benefit of the creditors of the testator." — *Per* POWELL, J., in *Wankford* v. *Wankford*, 1 Salk. 299, 303 (1703).

In *Patten* v. *Patten*, Alc. & N. 493 (1833), it was *held* that on ejectment by an administrator the fictitious demise might be laid before the grant of letters.

In equity a bill by an executor which does not allege probate is demurrable, *Humphreys* v. *Ingledon*, 1 P. Wms. 752 (1721). "An executor may at law bring an action before probate, but cannot declare till the will is actually proved, and a bill in equity being in the nature of a declaration at law, an executor cannot bring a bill here till after probate." — *Per* LORD HARDWICKE, C., in *Mitchell* v. *Smart*, 3 Atk. 606 (1748).

But if a bill, not only by an executor but by an administrator, alleges probate or grant of letters so as to be saved from demurrer, it is enough if the will is in fact proved, or the letters of administration granted at the time of the hearing; *Humphreys* v. *Humphreys*, 3 P. Wms. 349 (1735); *Fell* v. *Lutwidge*, Barnard. Ch. 319, 320 (1740); *Horner* v. *Horner*, 23 L. J. Ch. 10 (1853); 1 Dan. Ch. Pract. (6th ed.) 404, 405.

[2] See *Mountford* v. *Gibson*, 4 East, 441, 445; p. 472, *ante*.

WARING *v.* DUBERRY.

KING'S BENCH. 1718.

[*Reported Fortescue*, 360.]

GOODS were taken in execution and the money levied, then administration is taken to the landlord, who died intestate, and the administrator moved the court to have a year's rent.

PER CUR. He comes too late, and fictions in law by relation will not devest an interest vested in a stranger. Stat. 8 Anne, *c.* 17, page 245; Act of Distress and Sale, 2 W. & M. Sess. 1, *cap.* 5.[1]

BRAZIER *v.* HUDSON.

CHANCERY. 1836.

[*Reported* 8 *Sim.* 67.]

A TERM for years was vested in one Hodgson. He died, having appointed his wife his executrix. She assigned the term to Baxter, and died without proving her husband's will. After her death letters of administration, limited as to the term, were taken out to Hodgson.

On the hearing of an exception to the Master's report as to the title to the estate, one question was whether the administrator was the proper person to assign the term to a trustee for the purchaser.

Mr. Jacob and *Mr. T. H. Hall*, in support of the exception.

Mr. Knight and *Mr. Coote*, in support of the report.

THE VICE-CHANCELLOR. [SIR LANCELOT SHADWELL.] Lord Holt, in his judgment in *Wankford* v. *Wankford*, 1 Salk. 299, says that an act done by an executor is valid, provided the will is ultimately proved, although the executor who did the act died without proving the will. And I cannot but think that the convenience of mankind requires that all the acts of an executor that would be valid if probate had been taken, should be considered as valid if the will is ever afterwards proved. The consequence is that upon letters of administration to Hodgson, with his will annexed, being taken out, the assignment to Baxter will be established.

Exception allowed.[2]

[1] S. *c.* 11 Viner Ab. 133.

[2] See, *accord.*, *Johnson* v. *Warwick*, 17 C. B. 516 (1856).

FOSTER *v.* BATES.

EXCHEQUER. 1843.

[*Reported* 12 *M.* & *W.* 226.]

ASSUMPSIT by the plaintiff, as administrator of E. Pollard, deceased, for goods sold and delivered by the intestate, and also for goods sold and delivered by the plaintiff after his death, and before administration granted, and on an account stated with the plaintiff.

Plea, *Non assumpsit.*

At the trial before *Rolfe*, B., at the London sittings after last Trinity Term, it appeared that the defendants were partners in a company called the West African Company, trading to the coast of Africa, and that one Oldfield was their agent at Fernando Po. The goods in question had been sent by Pollard from this country to Africa for sale; he afterwards died intestate; and after his death, Oldfield, the defendants' agent, purchased the goods from the agent of the intestate there, who sold them for the benefit of the intestate's estate. Subsequently to the sale, the plaintiff took out letters of administration to Pollard, and brought this action for the price of the goods. It was objected at the trial, that the plaintiff was not entitled to recover, as the letters of administration did not relate back to the time of the death of the intestate, so as to vest in the administrator the right to sue on a contract made after his death. The learned judge, however, left the case to the jury, who found a verdict for the plaintiff, leave having been reserved to the defendants to move to enter a nonsuit.

Kelly having in the early part of this term obtained a rule accordingly,

W. H. Watson and *Greenwood* showed cause.

Hoggins (*Kelly* with him), in support of the rule.

Cur. adv. vult.

The judgment of the court (PARKE, B., GURNEY, B., and ROLFE, B.) was now delivered by

PARKE, B. In this case, which was argued a day or two ago, we delayed giving our judgment, not on account of any doubt we entertained at the time, but in order that we might refer to the several authorities cited at the bar. We are of opinion that the rule to enter a nonsuit must be discharged. The only question is, whether the plaintiff could sue for goods sold and delivered by him as administrator of one Pollard, upon the facts which were in evidence on the trial. It appeared that the goods were sold after the death of the intestate, and before the grant of letters of administration, by one who had been the agent of the deceased on the coast of Africa; and that they were there sold avowedly on account of the estate of the intestate.

It is clear that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate; and that he may recover against a wrong-doer who has seized or converted the goods of the intestate after his death, in an action of trespass or trover. All the authorities on this subject were considered by the Court of Common Pleas, in the case of *Tharpe* v. *Stallwood*, 12 Law J. N. S. 241, where an action of trespass was held to be maintainable. The reason for this relation given by Rolle, C. J., in *Long* v. *Hebb*, Styles, 341, is, that otherwise there would be no remedy for the wrong done. The relation being established for the benefit of the intestate's estate, against a wrong-doer, we do not see why it should not be equally available to enable the administrator to obtain the benefit of a contract intermediately made by suing the contracting party; and cases might be put in which the right to sue on the contract would be more beneficial to the estate than the right to recover the value of the goods themselves. In the present case, there is no occasion to have recourse to the doctrine, that one may waive a tort and recover on a contract; for here the sale was made by a person who intended to act as agent for the person, whoever he might happen to be, who legally represented the intestate's estate; and it was ratified by the plaintiff, after he became administrator: and, when one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command; nor is it any objection that the intended principal was unknown, at the time, to the person who intended to be the agent, the case of *Hull* v. *Pickersgill*, 1 Bro. & B. 282, cited by Mr. Greenwood, being an authority for that position. We are, therefore, of opinion, that the plaintiff is entitled to recover.

Rule discharged.[1]

WELCHMAN *v.* STURGIS.

Queen's Bench. 1849.

[*Reported* 13 *Q. B.* 552.]

Indebitatus *assumpsit* by plaintiff as administratrix. 1st count, for money had and received to her use as administratrix. 2d count, on an account stated with her as administratrix. Plea: *Non assumpsit.*

On the trial, before *Platt*, B., at the last Monmouthshire Spring Assizes, it appeared that the defendant had lived as housekeeper with the intestate since his separation from his wife, the present plaintiff, and had, after his death in May, 1848, and before the taking out of letters of administration by the plaintiff in June of the same year, applied, in payment of the funeral and other expenses, the cash that was

[1] See *Hatch* v. *Proctor*, 102 Mass. 351 (1869); *Leber* v. *Kauffelt*, 5 W. & S. 440 (1843).

in the house at the time of intestate's death, as well as divers sums of money arising from the sale of his effects, and also certain cash payments made to defendant after intestate's death by parties indebted to him. For the recovery of this money the present action was brought The defendant's counsel contended that the plaintiff could not recover in this action, inasmuch as the money claimed had been received by the defendant, and paid away by her, before the grant of administration to the plaintiff, and the property of the intestate did not vest in plaintiff before such grant. The learned judge overruled the objection: and a verdict was found for the plaintiff on the first count, and for the defendant on the second.

Keating, for the defendant, now moved for a new trial on the ground of misdirection.

Patteson, J. I think we should allow of no doubt that the administratrix in this case is entitled by relation to sue the defendant for money had and received to her use. There are express decisions to show that she could have sued in trespass or trover, for a trespass or a tortious conversion of the same date. Now, as regards the money produced by the sale of the effects, there having been no affirmance of such sale by the plaintiff, she is in a position to bring an action of trover: she may also waive the tort, and bring an action on contract. With respect to the money due to the intestate, and received by the defendant, it is true that no privity existed between her and the plaintiff; but, as such money is due to the administratrix by relation, she may affirm the receiving, and sue for the money as had and received to her use. In *Foster* v. *Bates*, 12 M. & W. 226, the court said: "There is no occasion to have recourse to the doctrine, that one may waive a tort and recover on a contract:" but in the present case that doctrine must be applied; and, the letters of administration relating back, the administratrix may elect to treat the money as received to her use.

Erle, J. With respect to the goods sold by the defendant, the case of *Fyson* v. *Chambers*, 9 M. & W. 460, is another authority to show that the plaintiff has a right to sue: and I do not think that any distinction can be drawn, as regards the relation back of the letters of administration, between goods and money specifically belonging to the intestate, or due to him, at the time of his death.

Rule refused.

MORGAN *v.* THOMAS

EXCHEQUER. 1853.

[*Reported* 8 *Exch.* 302.]

TROVER for household furniture. Pleas, Not guilty, and not possessed; upon which issues were joined.

At the trial, before *Crompton*, J., at the last Carmarthen Assizes, it appeared that the action was brought by the plaintiff, as administrator of his father, Thomas Morgan, for the recovery of the value of certain furniture which had been seized by the defendant as sheriff of the county under a writ of *fi. fa.* The intestate had resided for some years in the town of Carmarthen, and died in September, 1849. His wife and two daughters continued to reside in the house which they had occupied, but the plaintiff lived in a different part of the town. In February, 1851, the furniture of this house, which the widow so occupied, was seized under a writ of *fi. fa.*, upon a judgment obtained against her. The plaintiff served a notice on the defendant not to sell the goods, as being part of the intestate's estate, and not the widow's. The defendant, however, sold the goods, after having taken an indemnity from the execution plaintiff. In the following month of March, the plaintiff took out administration to his father, and subsequently brought this action to recover the value of the goods so seized and sold. Under these circumstances, it was contended, on the part of the defendant, that if the jury should be of opinion that the plaintiff had, after his father's death and before the taking out of administration, assented to the property of the intestate being taken by his mother and the other children, in satisfaction of their shares in the intestate's personal estate under the Statute of Distributions, the defendant was entitled to a verdict. The learned judge left that question to the jury, who found that "the plaintiff had tacitly assented, but that he had done no act." On the part of the plaintiff it was contended, that, although the letters of administration had such a relation as would maintain the action, *Tharpe* v. *Stallwood*, 5 M. & Gr. 760, yet there was no evidence of any assent on the part of the plaintiff as administrator; and if there was such evidence, that, inasmuch as it did not appear that there were no debts due from the estate unpaid, such assent, not being for the benefit of the estate, was of no effect. A verdict was entered for the plaintiff for the sum of £11 2*s.* 9*d.*, with leave to the defendant to move to set that verdict aside, and to enter a nonsuit.

Evans obtained a rule *nisi* accordingly, or for a new trial.

Davison (*Bowen* with him) showed cause.

Evans and *Grove*, in support of the rule.

POLLOCK, C. B. I am of opinion that this rule ought to be discharged. Unless the conduct of the party whose act is relied upon as binding the estate of the intestate be done by him in the character of administrator, it can have no operation upon the estate, and, accordingly, the utmost effect that can be given to the defendant's argument is, that where a party does an act professedly intending to take out letters of administration, and afterwards becomes administrator, the administration has relation back, and gives effect to what he had done by anticipation. But if that proposition be true in point of law, this case would entirely fail upon the facts, for there was no evidence whatever to warrant the jury in finding that the plaintiff had assented. Upon considering all the facts, there is no evidence bearing out the proposition of an assent, although it is true that the plaintiff was living at the time in the neighborhood, and was probably aware of what the parties were doing, and did not choose to interfere; yet it does not follow that he was acting in the character, or even in the assumed character, of administrator. With respect to the legal consideration of the case, the only matter adduced by the defendant's counsel, which is in the least in his favor, is what fell from the Court of King's Bench in *Kenrick* v. *Burges*, Moore, 125, and which turns out to have been a mere *dictum*, although, no doubt, the judges entertained that view of the question. But the modern authorities are opposed to the defendant's arguments, and, amongst other cases, that of *Woolley* v. *Clark*, 5 B. & Ald. 744, may be cited.

PARKE, B. I am of the same opinion; and I do not entertain a doubt upon the question. In the first place, there is no evidence whatever for the jury that the plaintiff ever assented, before he took out letters of administration, to the widow's taking this property as her share of the intestate's goods under the Statute of Distributions; because the principle is, that no consent can be implied against a person who has no power to dissent; and this principle is illustrated by the two legal maxims to which I have already referred. It is only where a man has the power of prohibiting a thing, that his omitting to exercise that power is evidence of his assent. Now at the time the intestate's widow took possession of this property, the plaintiff had no power to prevent her from so doing. He had no interest in the goods, and no power to take them away from her; and therefore, as he had no power to dissent, he did not assent by not interfering in the matter. Even supposing that he had in the most solemn manner, by an instrument under his hand and seal, assented to her doing so, it is perfectly clear from all the modern authorities, which are uniform upon the question, that she would not have thereby acquired a right to claim the property. An act done by a party who afterwards becomes administrator, to the prejudice of the estate, is not made good by the subsequent administration. It is only in those cases where the act is for the *benefit* of the estate that the relation back exists, by virtue of which relation the administrator is enabled to recover against such per-

sons as have interfered with the estate, and thereby to prevent it from being prejudiced and despoiled. It was not the duty of the plaintiff, acting in the character of administrator, to assent to a legacy till he had seen all the just debts owing by the estate duly satisfied.

ALDERSON, B. There was no evidence to warrant the jury in finding that the plaintiff assented; and that being so, there is nothing to which the relation back can have reference.

MARTIN, B. There is no evidence whatever to entitle the jury to find that the plaintiff has given such an assent as that contended for; and upon this ground alone the rule might be discharged. Upon the other point, the authorities are also clear. With regard to the objection, that inconvenience might arise if a person were to be deprived of property of which he had been in possession for many years, say for twenty years, by administration being taken out, it seems to me that it might fairly be left to the jury to say, whether such property had not come into the possession of the party by gift or by will.

Rule discharged.

MONROE *v.* JAMES.

SUPREME COURT OF APPEAL OF VIRGINIA. 1814.

[*Reported* 4 *Munf.* 194.]

IN this case (which was an action of detinue in behalf of the appellant against the appellee), the following case was agreed by the parties; viz. that the negro woman slave in the declaration mentioned, was the property of Joseph Jones, senior, deceased, at the time of his decease, and subject to the disposition of his last will and testament, set forth *in hæc verba;* the executors appointed therein being James Monroe, Joseph Jones, the testator's son, and others; that the defendant bought her, for valuable consideration, from one George Legg, who bought from Joseph Jones, jun., deceased (*named* one of the executors in said will), for valuable consideration, after the said Joseph Jones, jun., had attained the age of twenty-one years, and after the said will was duly proved and recorded; he, the said Joseph Jones, jun., now deceased, not having then, or after, qualified as executor under said will; that no other person had qualified as executor of said Joseph Jones, sen., or taken out letters of administration on his estate, at the time of the sale of the said negro woman by Joseph Jones, jun.; that the plaintiff is the only regularly qualified executor of said Joseph Jones, sen., deceased; that the negro slave in the declaration mentioned, is in the defendant's possession, and was so at the time of institution of the suit; and that demand of her was duly made before said institution.

The following clause in the will related to the subject of the present controversy: "I give and devise unto my son Joseph Jones, and his

heirs and assigns, all my estate real and personal. In case he shall die before he arrives to lawful age, or, being of lawful age, shall die without a child or children to inherit the estate hereby given to him, it is my will that the same shall, after his death, be divided between the children of my late sisters Esther Tyler and Elizabeth Monroe now living, allowing my nephew Colonel James Monroe the first choice."

A verdict was found for the plaintiff, subject to the court's opinion upon the case agreed. The court entered judgment for the defendant; whereupon the plaintiff appealed.

Hay, for the appellant.

Stanard, for the appellee.

Friday, February 11th, 1814, the judges (COALTER, CABELL, and FLEMING) delivered their opinions, *seriatim*.

JUDGE COALTER. In England an executor, before probate, may do almost everything which he can do afterwards. He may take possession of the goods, pay and receive debts, make acquittances and releases of debts, take releases, sell, or give away the goods, assent to legacies, &c.; and these things do not require a subsequent probate to confirm them; for, if he die *after* any of these acts done, and before probate, yet they stand good. He may sue and be sued, but cannot declare until probate: — he may file a bill, and it will be good if he takes probate before trial. These are the only acts which I can discover, which require a probate to enable him as effectually to do, as though the probate had been taken. Nay, where A., B., and C. are executors, and A. refuses, and B. and C. take probate, there A. continueth executor, notwithstanding his refusal (the will being proved in the names of all), so as he still may release debts due to the testator, and B. & C. cannot maintain suit in their names alone, but must join A. also: — the probate in fact inures to him, and he may administer thereafter at his pleasure, and intermeddle with the goods, as well as the others; and if he survives, he will proceed with the administration, as I understand.

The reason of all which is, that there an executor may undertake the trust reposed in him, as well by acts *in pays*, signifying his consent to do so, as by taking probate before the ordinary; and every act of administration or intermeddling with the estate, even in a slight degree, makes him executor, and he *cannot afterwards* refuse, but must proceed to execute the will: — he can be sued as executor, and if he pleads that he neither is executor, nor ever did administer as executor (which is the common plea to free himself in such case), it will be found against him, on such intermeddling being proved. The goods of the testator are considered his property from the death of the testator; and before probate he may maintain trespass, replevin or detinue, for goods taken or trespass done, after the death of the testator; for these actions arise on his own possession.

There, too, the probate, as well as the *refusal*, have relation to *the death of the testator*. As where administration had been committed before any will proved or notified to the ordinary, and the adminis-

trator sold some of the goods, the executor brought detinue for these goods, and recovered them.

And a *refusal* shall have a like relation, so that the administrator may have an action of trespass for goods taken before administration committed.

In this country, the executor is to take an oath, and give bond and security, in every case except where by the will it is dispensed with, and there too, if the court think proper to require it. Whereas, in England, he gave no bond, except where a court of chancery, to prevent fraud, should interpose and require bond, or where the testator, by his will, made an executor conditionally, that he put in security, and *then* be executor.

The Statute of 10 Ann. *ch.* 2, § 12, was the first law requiring security in this State; and that did not require it generally, but only in such cases where the court should have reason to suspect that an executor might act fraudulently; and which provides that such a failure to give security should be construed a refusal to act as executor, and that administration *cum testamento annexo* might, thereupon, be granted. This Statute has a proviso substantially the same with that of 22 Geo. 2, *ch.* 5, hereafter mentioned, as to the power of the executor before probate, or administration, as aforesaid.

This latter Statute requires bond and security to be given generally, as first above stated; and in the 21st section is the following proviso: "that nothing herein contained shall be construed to abridge or restrain the power of executors over their testator's estates, until probate of the will, *or administration with the will annexed*, be obtained or granted; but they may *possess* themselves thereof, and till then *execute their trust*, as fully and amply as if this Act had never been made."

This Act also provides that a failure to give security shall amount to a refusal of the executor to act.

The question is, what effect this Act, together with the exception, or proviso, had on sales made by the executor thus required to give bond, and who, in fact, never did give such bond; the Act of 1785 simply continuing the power of executors before probate, as heretofore.

Under the first Statute above mentioned, where the court, *suspecting fraud*, required security, could it have been intended that the executor, notwithstanding such requisition, might sell, give away, and waste the whole estate, and in fact commit the very fraud intended to be guarded against; so that there would be a dry and naked administration only to be granted? Suppose bond to be required in England by a court of chancery, would a sale, after the decree, be good, the executor never giving bond? Must not the purchaser notice this decree, and buy at his peril? But here, security is required by law, which is notice to all the world. If there are two or more executors in this country, and one refuses to give bond, and the other takes probate, can the refusing executor, who never gives bond, sell and dispose of the estate, as in England he may do?

It appears to me that the proviso must either destroy the great

objects of the law, or be itself declared void as contravening those great objects; or such a construction must be given that both can, with reason and propriety, stand.

The Statute in this country most materially innovates on the common law doctrines above noticed, in one great and important point, a proper consideration of which, I think, will aid much in guiding us in this inquiry.

By those doctrines, an executor once intermeddling with, or administering, in the smallest degree, the assets, takes upon him the executorship, and he can never afterwards refuse. Here the very clause requiring bond, and the proviso under consideration, suppose an intermeddling by the executor before bond given, by the terms of which he is to account for the assets that *have* or *may* come to his possession; yet the refusal to give that bond shall here be a refusal of the executorship, and administration may be granted; but refusal, as well as probate, relates to the death of the testator, who, on such refusal, is supposed to die intestate, as to the appointment of executors, and therefore the person named as such stands as having never been executor. I suppose it is for this reason, probably, that a refusing executor does not join in a suit, and is not sued, in this country. From this it would seem to result, that a qualification, and giving bond, are annexed, in all cases, *by law* (as it may in England, by the will itself), as conditions preceding the full right of the executor finally to act; and that, consequently, a probate, according to our law, will be necessary to confirm *mesne* sales, &c., made before such probate.

By the proviso, he may *possess* himself of the goods, and proceed to *execute* the *trust*. How? By wasting and giving away the goods? Surely not: — such acts would not be in execution, but in fraud of the trust. Our law does not direct a sale even of perishable goods, until after probate; and such is the multiplicity of courts, and the facility with which that may be obtained, that a sale or alienation of the effects can seldom be necessary in this country before probate. But if it should be necessary (as in some cases it may), it must be by one who is executor, that is, who shall give bond; for if he does not, he shall be considered as no executor: he cannot both be executor and no executor: he cannot both accept and refuse; and the person purchasing must trust to this subsequent act of confirmation. It is better it should be so than that the proviso should counteract the whole law.

The executor may do many things in the *execution of his trust*, before probate, which, though they would have been sufficient to make him executor in England, shall not here, if he refuse to give bond. He may see to burying the deceased, take possession of the goods, take care of them until probate or administration granted; may sue to prevent the Statute of Limitation from running; may be sued, for the same reason, &c. But if he proceeds actually to administer the estate, he must at least confirm those acts by probate and giving bond; for, until that is done, he may refuse the trust, and is no executor; and by that alone he elects to be executor.

This is the only way in which I can reconcile the Act to itself, and to the principles of the common law above mentioned. Either the proviso must defeat the law, or be itself defeated, or they must both receive such construction as that they may stand together. The law was intended to prevent frauds and embezzlement, and therefore ought to be construed liberally, so as to advance the remedy, and prevent the mischief. I can perceive little injury accruing, either way, under the construction now put; and if the powers of executors before probate are narrowed by it, and if estates may be injured through defect of power in the executor, it will but rarely happen; whereas, if their powers should be as large as is contended for, the evils would be incalculable.

On the whole, I think the law, on the case agreed, is for the appellant; and that, therefore, the judgment of the superior court of law is erroneous, and must be reversed, and judgment entered for the appellant.

Judge Cabell. The question presented by the case agreed is, whether a sale, for valuable consideration, of a slave belonging to the estate of a testator, by a person named as executor, but who never qualified by giving bond and security, is good against the executor who did qualify.

Were this case to be decided by common law principles, without regard to our Act of Assembly, it would not admit of doubt. An executor derives his power from the will; and, at common law, nothing was required to invest him with the full exercise of that power, for almost every possible purpose, but his acceptance of the trust. By any intermeddling with the estate, which amounts to a partial administration, he is considered as having accepted the trust, and taken upon himself the whole administration; and he becomes thereby, *ipso facto*, complete executor: and it is on this ground, and on this only, that, although he may die before probate of the will, yet the acts done by him will be valid.

These principles of the common law must be applied to, and must govern this case, except so far as they may have been changed by our Acts of Assembly. It is impossible to read our Statutes upon this subject, without being struck by one most important change. To the confidence reposed in the executor by the testator, there is superadded the necessity of giving bond and security for the faithful discharge of the duties of the office. The refusal or failure to give security is expressly declared to amount to a refusal of the executorship; and the court shall, thereupon, grant letters of administration, with the will annexed, to the person to whom administration would have been granted if there had been no will. In this country, therefore, he is not, as in England, complete executor by a mere partial administration of the estate. To make him complete executor, it is indispensably necessary that he shall qualify by giving bond and security. The only principle, then, which at common law gave validity to the acts of an executor who died before probate, is

done away by this Statute: and, if there had been no further provision in the law, I presume the opinion would have been universal, that the acts of an executor who never qualified would not be valid against one who had qualified. But it is contended, that the twenty-second section which declares, that "the power of executors over their testators' estates before probate of the will is not hereby restrained, but shall continue as heretofore," is so express and positive, that it will be impossible to invalidate any acts of the executor, however ruinous to the estate, and even although he should afterwards refuse or fail to give security. The certain consequence of this construction would be to defeat the great object of the Legislature, the protection of the rights of creditors and of legatees; for any executor, so disposed, might waste the whole of the estate before the court could arrest his progress by granting letters of administration. Such inconsistency cannot be attributed to the Legislature. A just construction will give harmony to all parts of this important Statute. The interest of the estate will, almost always, require many acts to be done before an executor can qualify. Without defining any particular cases, the law therefore has wisely provided that the power of an executor before probate shall remain unrestrained. The confidence reposed in him by the testator, his acceptance of the trust, and the necessity of the case, require that he have power to do whatever he might have done at common law. As he *may* become complete executor, by giving bond and security, and as he *ought* to do so after having intermeddled with the estate, the law so far regards him as executor, as to consider his acts valid for the present; and they will become irrevocably so, provided he shall perfect his character as executor, by a subsequent qualification. But, if he refuses or fails thus to qualify, he is considered as having altogether refused the executorship; and this refusal relates to the death of the testator. As to him, the will is considered as having never been made; and, thus, the only foundation of his authority being done away, all his acts are invalidated.[1]

ALVORD *v.* MARSH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1866.

[*Reported* 12 *Allen*, 603.]

CONTRACT brought by the administratrix of the estate of Justus B. Alvord, against the administrators of the estate of Robert G. Marsh, to recover $100 for work done by Alvord for Marsh. The bill of par-

[1] The opinion of JUDGE FLEMING in concurrence is omitted.

See, *accord.*, *Gay* v. *Minot*, 3 Cush. 352 (1849); *Stagg* v. *Green*, 47 Mo. 500 (1871). Cf. *Thomas* v. *Cameron*, 16 Wend. 579 (1837); 1 Woerner, Amer. Law of Adm. § 172. Whether the common law prevails in those States where a bond is not required from executors, *quære*. In *Magwood* v. *Legge*, Harp. 116 (1824), it was applied. See *Shoenberger* v. *Lancaster Sav. Inst.*, 28 Pa. 459 (1857).

ticulars annexed to the writ consisted of a charge for "work and labor each month in 1860, 1861, $300." The defendants admitted that Alvord performed work for Marsh, but professed their ignorance of the amount and value of his services; averred that Marsh and the plaintiff had a settlement, and that he paid her the balance found due on accounting together; and also filed a declaration in set-off, with an account of about two hundred items, amounting together to $788.95.

The case was submitted to the determination of the Superior Court upon the pleadings, and the report of W. B. C. Pearsons, who made an award as referee under rule of court. The following is an exact copy of the whole of this award, with the exception of the merely formal parts:

"It appeared in evidence that plaintiff's intestate died June 5th, 1861, and letters of administration were issued to plaintiff Nov. 5, 1861. The defendant relied upon a set-off, embracing items of account between June 5th, 1861, and Sept. 1st, 1861, of goods sold, $11.53; labor of man, $9.00; funeral expenses, $15.87; cash, $6.05; and rent of tenement for June, July, and August, 1861, $11.00, furnished to the plaintiff. It was not proved that these items were furnished in pursuance of any contract with the intestate. The plaintiff objected to the allowance of any of these items, as having been made between the death of plaintiff's intestate and the issuing of letters of administration.

"The defendant also relied upon a receipt duly proved, of which the following is a copy: 'Holyoke, Aug. 30, 1861. Received of R. G. Marsh twenty dollars in full of all demands on account of the estate of Justus B. Alvord, late of Holyoke, deceased, also in full of house-rent, and all other bills against myself to Aug. 1st, 1861. (Signed) Nancy A. Alvord. Attest: W. A. Judd.' The amount actually paid upon this receipt was $17.00, and it did not pay the full balance, as appeared upon a careful computation of the books, by the amount of $1.20.

"I therefore allow in defendant's set-off the items of goods sold, $11.53; funeral expenses, $15.87; cash, $6.05; and disallow for labor of man, $9.00, and rent of tenement in July and August, $7.00. I also allow the plaintiff $1.20, as appears by the correct computation of the books, and adjudge that the plaintiff recover of the defendant the sum of seventeen dollars and twenty cents, as damages and costs taxed at. The costs to be agreed by the counsel for parties, except referee's costs."

Judgment was thereupon rendered for the defendant, and the plaintiff appealed to this court.

G. M. Stearns, for the plaintiff.

J. Wells and *A. L. Soule*, for the defendants.

Hoar, J. The taking out letters of administration relates to the death of the intestate, and by operation of law makes valid all acts of the administrator in settlement of the estate from the time of the death.

It therefore legalizes receipts of property by the administrator for which he would otherwise have been responsible as executor *de son tort;* and requires him to account for them in regular course of administration. *Shillaber* v. *Wyman*, 15 Mass. 322; *Andrew* v. *Gallison*, Ib. 325, *n.*; *Priest* v. *Watkins*, 2 Hill (N. Y.) 225. It has indeed been doubted whether an executor *de son tort* can give any title to the goods of the intestate as against the rightful administrator, especially where the conveyance is the single wrongful act which makes him executor *de son tort.* *Mountford* v. *Gibson*, 4 East, 441; *Pickering* v. *Coleman*, 12 N. H. 148. But no such question can arise where, as in the present case, the alleged executrix *de son tort* becomes herself afterward the lawful administratrix. Her acts of receiving debts due to the estate, or property belonging to it, become by relation lawful acts of administration, for which she is liable to account, to the same extent as if they had occurred after the letters of administration were granted. The liability thus imposed upon her necessarily involves a validity in her acts which is a protection to those who have dealt with her concerning the estate. The plaintiff, therefore, if she has undertaken to receive a debt due to the estate which she represents before her appointment as administratrix, and has given a discharge or acquittance therefor which would have been valid if she had then been duly appointed, has made herself chargeable with the whole amount of the debt; her subsequent appointment gave complete validity to the transaction; and she cannot maintain her action.

It then remains to determine whether, upon the facts agreed, the defendant paid or satisfied the debt due from him to the intestate. The claim annexed to the plaintiff's writ is for work and labor, $300. The defendant has filed a declaration in set-off amounting to $788.95, and embracing a very large number and variety of charges. Among them were some claims against the administratrix personally, for money and rent due from her after the death of her intestate. She gave to the defendant a receipt in full of all demands on account of the estate, including a settlement of these personal liabilities, on the payment by him of $17. The facts show that, upon a careful computation of all amounts proved on each side, this sum was not sufficient by the amount of $1.20. But we can have no doubt that an administratrix, who is herself indebted to a debtor of the estate, may, if she chooses, accept a discharge of her own debt toward the payment of the debt due to her as administratrix. By so doing she makes herself answerable to the estate for the whole debt which she thus settles and discharges. And while it is clearly settled that the receipt of a less sum is no valid discharge of a larger amount which is due, yet this applies only to the case of an ascertained and undisputed debt. The rule has no application to the case of an accounting together between two parties having various and unliquidated demands against each other. As the plaintiff's demand was for labor, of which both the time and the price were to be proved or agreed; as the defendant had an account of a much

larger amount; as questions of interest might very likely arise; and as the sum fixed by the parties, without fraud or concealment of facts, was within such a trifling amount of the sum appearing to be due upon a new and "careful computation of the books;" the case comes precisely within the authority of *Donohue* v. *Woodbury*, 6 Cush. 148. The settlement between the plaintiff and defendant was in the nature of an *insimul computassent;* and the receipt in full was a bar to the action.

Judgment for the defendants.

GILKEY *v.* HAMILTON.

SUPREME COURT OF MICHIGAN. 1871.

[*Reported* 22 *Mich.* 283.]

ERROR to Kalamazoo Circuit.

The plaintiffs below, as administrators of the estate of Harvey Hamilton, brought their action in the Circuit Court of the County of Kalamazoo against Edward Gilkey, of replevin for a horse, which belonged to their intestate at the time of his death. The plaintiffs, who are respectively the son and wife of Harvey Hamilton, subsequent to the death of Hamilton and prior to the issuing of letters of administration to them, had delivered the horse to an agent with instructions to sell or dispose of him. Under these instructions the agent transferred the horse to defendant Gilkey, who claimed that the transaction was a valid sale, and refused to deliver the horse to the plaintiffs when demanded by them after they had received their letters of administration. On the trial the court excluded all evidence of the instructions by the plaintiffs relative to the sale or transfer of the horse, prior to their appointment as administrators; and, under the charge of the court, they had a verdict and judgment, which the defendant, Gilkey, brings into this court for review.

Arthur Brown and *D. D. Hughes*, for plaintiff in error.

H. F. Severens, for defendant in error, was stopped by the court.

COOLEY, J. This case presents the question whether, where one interferes with the property of a deceased person and sells a portion thereof without right, and is afterwards appointed administrator on the estate of such deceased person, he will be estopped by his prior acts from recovering the property for the estate.

The plaintiff in error insists that he is; and he calls our attention to a considerable list of judicial decisions in which it has been held, that when one is appointed administrator on the estate of a deceased person, his title relates back to, and takes effect from, the date of the death of the intestate. And the inference he deduces from these cases is, that the legal effect of whatever is done by the person thus appointed inter-

mediate the death of the intestate and his own appointment, is precisely the same as though he had held letters of administration at that time.

The doctrine of relation is a familiar and important one, and, indeed, is quite necessary to the protection of the interests of the estate. But this necessity is the reason upon which it rests, and it is no part of its purpose to legalize lawless acts which may, and generally would, work the estate a prejudice.

Under our probate system, an administrator is a mere officer of the law, who has title to the assets for the purpose of collecting and disposing of the same for the benefit of creditors and the next of kin. When he receives his letters, his title is correctly said to relate back to the death of the intestate; but it is an official title, and his being clothed with it cannot make good the prior acts which he has not assumed to do officially, but in a different capacity from that in which he is now acting. One man appointed administrator cannot have less power than any other man would have had if he had received the same appointment; the force and effect of his letters cannot be limited and restrained by his previous acts in his private character, any more than the official authority of a sheriff or any other public officer can be limited and restrained by what he may have done as an individual previous to his election. On his appointment, the administrator becomes vested officially, and for the purposes of the trust, with all such title as his intestate had to the personalty at his death; and he is neither obliged to, nor has he the right, to recognize, validate, and bind the estate by the unauthorized acts which have been done to the prejudice of the estate by any one while the title was in abeyance.

The doctrine of executor *de son tort* is alluded to as having some bearing, but it is a doctrine not permissible in our system. Our law looks to the interest of the estate, and employs the administrator as a mere instrument to guard, defend, and advance that interest. To apply the doctrine of estoppel as between the administrator and one whom, as an individual, he may have dealt with improperly, would be to treat the administrator as more important than the estate, — the agent as more important than the principal, — the instrument as more to be regarded than the object to accomplish which the instrument is created. In truth, the administrator is merely the representative of the estate: the estate, in his person, is the party to the contracts he makes and the suits he brings; and to make the doctrine of estoppel applicable, it must be shown that the equities it rests upon are equities against the estate. But certainly there is nothing in the fact that a man is appointed administrator, who has previously misconducted himself, which can justly raise against the estate any equities, or which can justly deprive the creditors or next of kin of any of their rights in its assets.

We do not deem it necessary to examine this subject in detail, because we regard the previous decisions in *Cullen* v. *O'Hara*, 4 Mich. 138, and *Morton* v. *Preston*, 18 Mich. 71, as conclusive upon it; and

we have only alluded in very general terms to what seem to us the obvious reasons on which those cases rest.

The judgment must be affirmed, with costs.

The other justices concurred.[1]

NOTE. — In *Holland* v. *King*, 6 C. B. 727 (1848), it was *held*, that an option given to the executor or administrator of a deceased partner to succeed to such partner's share, if exercised within three months of his death, was not well exercised by the widow of a deceased partner, who gave notice of her intention to avail of the option within the three months, but did not take out letters of administration until they had expired.

In *Regina* v. *Toppin*, Car. & M. 545 (1842), upon an indictment for stealing from the body of a dead man goods which had belonged to him, an allegation that they were the property of the bishop of the diocese in which he died was *held* good. Cf. *Wonson* v. *Wonson*, 13 Pick. 402 (1832).

SECTION II.

WHAT INTERESTS PASS TO THE EXECUTOR OR ADMINISTRATOR.

A. *In general.*

ST. 13 EDW. I. (WESTM. II., 1285) c. 23. Executors from henceforth shall have a writ of accompt, and the same action and process in the same writ as the testator might have had if he had lived.

ST. 4 EDW. III. (1330) c. 7. Item, Whereas in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; (2) it is enacted, that the executors in such cases shall have an action against the trespassers, and recover their damages in like manner, as they, whose executors they be, should have had if they were in life.[2]

ANONYMOUS.

COMMON PLEAS AND QUEEN'S BENCH. 1574.

[*Reported Jenk.* 241.]

A. B. AND C. are coparceners; they purchase other land than the coparcenary land to them and their heirs; and by indentures they covenant every one with the other respectively for them and their heirs,

[1] See, *accord.*, *Wiswell* v. *Wiswell*, 22 Mich. 371 (1886).

[2] Rights of executors to "have actions of debts, accompts, and of goods carried away," were extended by St. 25 Edw. (1350) *c.* 5, to executors of executors; and rights "to demand and recover as executors the debts due" to the intestate, were given by St. 31 Edw. III. (1357) *c.* 11, to administrators.

with every one of them and their heirs, that the survivor or survivors of them and their heirs shall convey to the heir or heirs of the others who die first, separately, at the costs of the heir or heirs, an equal part with the survivor or survivors; they purchased the land in Kent; A. and B. die, the heir of A. sues covenant against C. and alleges that he tendered to C. in Kent an assurance to be made of the said purchased land: whereas the sale was made in Kent, and the tender was, in truth, in the county of Middlesex; and the action of covenant was brought in Kent by the heir of A. and issue was joined upon the tender of the assurance, and it was found with the plaintiff: He had judgment, which was affirmed in error.

Resolved in this case: 1. That this is a real covenant which goes to the heir of the covenantee. 2. That the plaintiff has his election to bring his *action* of covenant, *either* in Kent where the purchase was made, or in Middlesex where the tender was made.[1]

RUTLAND *v.* RUTLAND.

COMMON PLEAS. 1595.

[*Reported Cro. El.* 377.]

ELIZABETH Countess of Rutland, and other executors of Edward Earl of Rutland, executor of John Earl of Rutland, against Isabel Countess of Rutland. Action upon the case of trover of divers jewels and other goods to the value of £1,000, and allegeth, that the defendant knowing those goods to appertain to John Earl of Rutland in his lifetime, and after his death to Edward Earl of Rutland, as executor to John, and after his death to the plaintiff, as executor to Edward, executor to John, had converted them to their damage of £1,000. The defendant pleaded not guilty; and found guilty to the damage of £940.

It was now moved in arrest of judgment, that this action lies not for an executor upon a trover and conversion in the time of their testator; for it is not within the 4 Edw. 3, c. 7, as a *quare impedit* and an *ejectione firmæ* have been taken to be within the equity thereof.

Secondly, because there is not any certain time shown of the conversion, whether it were in the time of the testator or of the executor.

As to the first, all the JUSTICES resolved, that an executor may well maintain an action for goods converted in the time of their testator, by the equity of the 4 Edw. 3, c. 7, as well as a *quare impedit;* and so is the common experience at this day.[2]

[1] The rest of the case, upon the sufficiency of the tender, is omitted; s. c. *sub nom. Wotton* v. *Cooke*, Dyer, 337 *b*.

[2] Part only of the case is given.

SMITH *v.* COLGAY.

Queen's Bench. 1595.

[*Reported Cro. El.* 384.]

Trespass by an administrator *de bonis asportatis in vita intestati*. After verdict it was moved in arrest of judgment, that this action is not given by the 4 Edw. 3, *c.* 7. But ruled without argument, that the action lay by the equity of the Statute; for it is in equal mischief. 14 Hen. 7, pl. 13, "*Accord.*"

EMERSON *v.* EMERSON.

King's Bench. 1672.

[*Reported* 1 *Vent.* 187.]

Trin. ult. Rot. 1389. Error of a judgment in the Common Pleas, in an action of trespass by the plaintiff as executor, upon the Statute of 4 E. III. *De bonis asportatis in vita testatoris.* The plaintiff declared, that the defendant *blada crescentia* upon the freehold of the testator, *messuit*, *defalcavit*, *cepit*, *et asportavit.*

Upon not guilty pleaded, a verdict and judgment was for the plaintiff, and assigned for error, that no action lay for cutting of the corn; for that is a trespass done to the freehold of the testator, for which the Statute gives the executor no action, and while the corn stands, 't is to many purposes parcel of the freehold. So that if a man cuts corn and carries it away presently, though with a felonious intent, 't is no felony: otherwise, if he let it lie after 't is cut, and at another time comes and steals it. So that it appears for parcel of the trespass no action lies; then entire damages being given as well for the cutting, as carrying away of the corn, the judgment is erroneous.

But all the Court were of another opinion; for 't is but one entire trespass; the declaration only describes the manner of taking it away. Indeed, if it had been *quare clausum fregit et blada asportavit*, it had been naught; or if he had cut the corn and let it lie, no action would have lain for the executor. So if the grass of the testator be cut, and carried away at the same time; because the grass is part of the freehold, but corn growing is a chattel. The Statute of 4 Ed. III hath been always expounded largely.[1]

[1] Cf. *Williams* v. *Breedon*, 1 B. & P. 329 (1798).

WILLIAMS *v.* CAREY.

King's Bench. 1695.

[*Reported* 1 *Salk.* 12.]

Williams, the executor of J. S., brought case against Carey the sheriff. for that his testator having recovered judgment in debt against A. sued out a *fieri facias*, whereon the defendant returned, he had levied £19 5*s.* 4*d.* and that he had taken other goods to the value of 40*s.* which remained in his hands *pro defectu emptorum*, and that A. had no other goods, *ubi revera* the sheriff had levied the whole debt, and averred that afterwards A. become poor, and unable to satisfy the residue of the debt. Verdict *pro quer.* It was objected in arrest of judgment, that this was a personal tort, and not within 4 E. 3, *c.* 7. Sed Cur. contra. There is a great difference between *mesne* process, as the case in Jones, 173; Noy, 87; Latch, 167; Poph., 187, and this case, which is a process in execution; for by levying of the goods a right was vested in the testator. Judgment *pro quer.*[1]

BERWICK *v.* ANDREWS.

Queen's Bench. 1703.

[*Reported* 1 *Salk.* 314.]

Judgment was obtained against J. S. as executor, and now the executor of him that obtained the judgment brought an action of debt upon that judgment against the said J. S., suggesting a *devastavit* in the lifetime of his testator, and had judgment by *nihil dicit* in C. B. And now error being brought it was objected, that the plaintiff was not privy to the judgment, and therefore ought first to have brought his *scire facias*, and then have suggested a *devastavit* according to the case of *Wheatly* and *Land*, 1 Saund. 216, and that this was carrying *devastavits* a step farther than they had yet gone. Sed per Cur. It

[1] See *Paine* v. *Ulmer*, 7 Mass. 317 (1811).

In *Le Mason* v. *Dixon*, W. Jones, 173 (1628), the Court of King's Bench were equally divided on the question whether an action against a bailiff for suffering an escape of one held on mesne process survived to the executor under the St. of 4 Edw. III. *c.* 7. Doderidge and Whitelocke, JJ., were of opinion that the action lay, for that the Statute "*est prise largement per equity.*" Hyde, C. J., and Jones, J., thought that the "Statute gives remedy of goods and chattels only, and not for any other trespass, as assault and battery, slander, deceit, false imprisonment *et similia.*" The case was left undetermined.

lies for the executor of him to whom the wrong was done, though it lies not against the executor of him that did the wrong. Here the defendant is the person against whom the recovery was, and he has admitted assets; and the executor may as well maintain this action, as he may an action of debt for an escape where his testator might. So an executor of a parson shall maintain debt for tithes, as the testator might: for in this case the tort was to the property of the testator, and vested an interest in him, and is within the equity of the Statute *De Bonis Asportatis;* and the same reason holds for an action of debt, as for a *scire facias*. *Vide* 2 Sid. 102.[1]

DOE d. SHORE *v.* PORTER.

King's Bench. 1789.

[*Reported* 3 *T. R.* 13.]

This was an action of ejectment for a messuage, cottage, and half an acre of land, brought upon the demise of John Shore, administrator of the effects and credits of William Shore, deceased; which demise was laid in the declaration to commence from the first of March, in the 27th year of the reign, &c., to have and to hold the said premises for seven years, &c. To this the defendant pleaded not guilty; and at the trial, lease, entry, and ouster being confessed, the plaintiff produced one William Shore as a witness, who gave evidence as follows: "The premises did belong to me. I granted a lease to the defendant; William Shore was under-tenant to him; he paid me the rent reserved by Porter's lease two or three times; he paid to Lady-day, 1786. William Shore died the 31st of October, 1786. Porter accepted the deceased as his tenant on my recommendation. Porter paid me rent while the deceased was in possession, and told me I need not take the trouble of coming over to him, but receive the rent of the deceased. The deceased came in in the summer of 1780; my rent was due every Lady-day." The plaintiff also proved the letters of administration duly taken out. To this evidence the defendant demurred, and the plaintiff joined in demurrer.

Palmer, in support of the demurrer.

Law, *contra*, was stopped by the court.

Lord Kenyon, C. J. The lessor of the plaintiff, who is the administrator of William Shore, claims as tenant from year to year the property which is the subject of this ejectment. And the first question is, What title is proved to have been in William Shore at the time of his decease, by the evidence stated on this record? And I think that the only inference to be drawn from it is, that he had that interest

[1] s. c. 2 Ld. Raym. 971.

which his administrator says he had, namely, a tenancy from year to year so long as both parties pleased. As between the original parties, as long as both of them lived, he could not have been dispossessed without six months notice ending at the expiration of a year. But it is argued that though this was the interest which William Shore had, a different interest devolved on his personal representative. On this question I do not know how to state a doubt; for this was a chattel interest from year to year as long as both parties pleased; and it seems clear to me, that whatever chattel the intestate had must vest in his administrator as his legal representative. Then it is supposed that some inconveniences may result from such a determination: but I see none; and many inconveniences might attend a different decision. The tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences. And in order to obviate them, the courts very early raised an implied contract for a year, and added that the tenant could not be removed at the end of the year without receiving six months previous notice. And all the inconveniences which arise between the original parties themselves, and against which the wisdom of the law has endeavored to provide by raising the implied contract, exist equally in the case of their personal representatives. Then is there any objection in point of form against the plaintiff's recovering in this ejectment? The interest of the plaintiff cannot be in any manner affected by the length of time stated in the declaration in ejectment; the whole of which is an absolute fiction. And this fiction does not even affect the case of an action for the mesne profits. The case cited from Levinz [*Roe* v. *Williamson*, 2 Lev. 140; 3 Keb. 490] is entitled to greater consideration than that in Keble, who was a bad reporter; and according to the former report the question was adjourned; and Twisden, J., who was a very able lawyer, was of a different opinion from the two other judges; besides, these kind of proceedings were not then so well understood as they are at this time. And the doctrine in Keble has been entirely exploded of late years. Therefore I am of opinion that there is no ground for either of the objections.

Ashhurst, Buller, and Grose, JJ., concurring.

Judgment for the plaintiff.

CHAMBERLAIN *v.* WILLIAMSON.

King's Bench. 1814.

[*Reported* 2 *M.* & *S.* 408.]

Assumpsit by the plaintiff as administrator, upon a breach of promise of marriage made to the intestate, laying the promise in the usual way; and the plaintiff avers that the intestate, confiding in

the said promise, &c., remained sole and unmarried until her death, and was ready, &c., and although she requested the defendant, &c., yet the defendant did not when requested, or at any time, marry her, but refused, &c. And there were several other counts varying the promise; but the declaration did not allege any special damage, but concluded to the damage of the plaintiff as administrator, &c. Plea, *Non assumpsit*.

At the trial before *Bayley*, J., at the last assizes for the county of Gloucester, the promise was proved, and it further appeared that the intestate kept a boarding-school, which, it was agreed with the defendant, that she should relinquish at Christmas, 1812, in order to be married. In the preceding November, however, the defendant broke off all further intercourse, and soon afterwards the intestate's health began to decline, and she was compelled to quit her school, and died in the following May. The learned judge doubted whether the action were maintainable, but assuming for the time that it was, he directed the jury to consider of the damages as if the action had been by the intestate herself, for that whatever compensation in money she would have been entitled to, by so much she would have died the richer. The jury found a verdict for the plaintiff, damages £200.

In Michaelmas Term a rule *nisi* was obtained for arresting the judgment, on the ground that this action was not maintainable by the personal representative; or for a new trial, on the ground of a misdirection. And upon the first point the Stat. 4 Ed. 3, *c.* 7, *De Bonis Asportatis in Vita Testatoris*, and 31 Ed. 3, *c.* 11, were cited, and also Com. Dig. Administration, B. 13, "that by the equity of these Statutes an executor or administrator shall have every action for a wrong done to the *personal estate* of his testator," Latch. 168. But this, it was said, is not a wrong to *the personal estate*. And in *Mordant* v. *Thorold*, 1 Salk. 252; s. c. Carth. 133, it was resolved that the administrator was not entitled to a *scire facias* upon a judgment in dower obtained by his intestate, where she died before the damages had been ascertained on a writ of inquiry, because the writ of inquiry being in the nature of a personal action for the damages, it dies with the person. And as to the misdirection, it was objected that the criterion of damages could not be the same as if the action had been by the intestate herself, by reason that she would have been entitled to damages for the loss of personal comfort, and advancement in life, and also for personal feelings; whereas the administrator could only be entitled in respect of the damage to or deterioration of her personal estate.

Peake (with *Dauncey*) now showed cause.

Jervis and *Abbott*, contra.

Lord Ellenborough, C. J., said it was a case of novelty, and importance in its principle, and that it had been ingeniously argued; the not finding any precedent for such an action made it very fit that the court should pause, in order to look into the cases. And Le Blanc, J., said that they could not but recollect that though the damages in

actions of this sort were given strictly as a compensation, yet they were almost always considered by the jury somewhat *in pœnam.*

Cur. adv. vult.

Lord Ellenborough, C. J., delivered the judgment of the court in substance as follows: —

This was a motion in arrest of judgment in an action brought by the plaintiff, as administrator, for a breach of promise of marriage made to the intestate by the defendant. The declaration did not contain any allegation of special damage; and the question was, whether the action is maintainable by the personal representative. The action is novel in its kind, and not any one instance was cited or suggested in the argument of its having been maintained, nor have we been able to discover any by our own researches and inquiries, and yet frequent occasions must have occurred for bringing such an action. This circumstance imports at least an opinion not very favorable to this species of action. However, that would not be a decisive ground of objection, if on reason and principle it could strictly be maintained. The general rule of law is, *Actio personalis moritur cum persona;* under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. But in that case the special damage ought to be stated on the record; otherwise the court cannot intend it. If this action be maintainable, then every action founded on an implied promise to a testator, where the damage subsists in the previous personal suffering of the testator, would be also maintainable by the executor or administrator. All injuries affecting the life or health of the deceased; all such as arise out of the unskilfulness of medical practitioners; the imprisonment of the party brought on by the negligence of his attorney; all these would be breaches of the implied promise by the persons employed to exhibit a proper portion of skill and attention. We are not aware, however, of any attempt on the part of the executor or administrator to maintain an action in any such case. Where the damage done to the personal estate can be stated on the record, that involves a different question. Although marriage may be regarded as a temporal advantage to the party as far as respects personal comfort, still it cannot be considered in this case as an increase of the individual transmissible personal estate, but would operate rather as an extinction of it; though that circumstance might have been compensated by other advantages. Loss of marriage may, under circumstances, occasion a strict pecuniary loss to a woman, but it does not necessarily do so; and unless it be expressly stated on the record by allegation the court cannot intend it. On the ground, therefore, that the present allegation imports only a personal injury, to which the administrator is not by law, nor is he in fact shown to be, privy, we are of opinion that, in the

absence of any authorities, this administrator cannot maintain this action. The cases which were cited on the other side do not appear to have such an immediate bearing on the question as to require that they should be reviewed and commented on. We are of opinion that this judgment must be arrested, and of course the motion for a new trial is thereby disposed of.[1]

KNIGHTS *v.* QUARLES.

COMMON PLEAS. 1820.

[*Reported* 2 *Brod. & B.* 102.]

ASSUMPSIT. The declaration stated that before the time of making the promise therein contained, and in the lifetime of the deceased, the deceased had contracted with one Savory for the purchase of certain premises at Thetford, which Savory assumed to have sufficient power and title to sell and convey to the deceased; and thereupon, in the lifetime of the deceased, (in consideration of the premises, and that the deceased, at the special instance and request of the defendant, had retained and employed the defendant as his attorney and solicitor, to ascertain and investigate the title of Savory to the said premises, and to cause and procure the same, and a good title thereto, to be duly and effectually conveyed by Savory to the intestate as purchaser, for certain fees to be therefor paid by the intestate to the defendant,) the defendant undertook and promised the deceased, in his lifetime, to perform and fulfil his duty in the premises. Breach, that although it was the duty of the defendant, by virtue of his retainer, to investigate carefully the title of Savory to the premises, and to take due and proper care that a bad title to the same should not be accepted by the deceased, yet the defendant, not regarding his duty in that behalf, but contriving and fraudulently intending, &c., did not nor would carefully investigate the title of Savory in the premises, or take due or proper care that a bad or insufficient title was not accepted and received by intestate, but on the contrary the defendant wholly neglected and refused to do so; and in the lifetime of the deceased the defendant, in violation of his promise and undertaking, caused and procured, &c., the deceased, without his knowledge or consent, to accept and receive, and the said deceased in his lifetime did accordingly accept and receive from Savory a bad, defective, and insufficient title to the said premises; and thereupon such title was conveyed by Savory to the deceased in his lifetime, and the deceased paid Savory as the consideration-money in

[1] See *Hovey* v. *Page*, 55 Me. 142 (1867). Cf. *Finlay* v. *Chirney*, 20 Q. B. Div. 494 (1888), p. 650, *post*; *Smith* v. *Sherman*, 4 Cush. 408 (1849); *Chase* v. *Fitz*, 132 Mass. 359 (1882); *Wade* v. *Kalbfleisch*, 58 N. Y. 282 (1874), in which cases it was *held* that the action did not survive *against* the legal representative. See also *Price* v. *Price*, 75 N. Y. 244 (1878).

that behalf £2,000, by means of which the deceased, in his lifetime and until his death, held the premises on a bad and insufficient title, and was in his lifetime wholly unable to sell or dispose of the same. The count then alleged special damage to the deceased and his personal estate. The declaration contained other counts, varying the statement of the contract, in one of which counts the defendant was charged generally and not as an attorney. To these counts the money counts were added.

Demurrer and rejoinder.

Doyly, Serjt., for *Blosset*, Serjt., in support of the demurrer.

The COURT stopped *Frere*, Serjt., who was to have argued for the plaintiff, expressing an unanimous opinion that there was no ground for the demurrer, an express promise being alleged, a breach of it in the lifetime of the intestate, and an injury to his personal property, the truth of which allegations was admitted by the demurrer; that it made no difference in this case whether the promise were express or implied, the whole transaction resting on a contract; that though, perhaps, the intestate might have brought case or *assumpsit* at his election, *assumpsit* being the only remedy for the administrator, it was very necessary the action should be maintained or the defendant might escape out of the consequences of his misconduct, and the intestate's estate suffer an irreparable injury. It was further observed, that if a man contracted for a safe conveyance by a coach, and sustained an injury by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured, — though it was clear, he in his lifetime might at his election sue the coach proprietor in contract or in tort, it could not be doubted that his executor might sue in *assumpsit* for the consequences of the coach proprietor's breach of contract. That it could not be pretended that the contract of the defendant in this case was a contract running with the land; but if it were so, an action would lie by the administrator for a breach and damage incurred in the time of the testator; and as to the alleged omission of certain averments in the declaration, respecting the defendant's profession, at all events the admission of an express promise, implied by the demurrer, rendered any such allegation unnecessary.

Judgment for the plaintiff.

ORME *v.* BROUGHTON.

COMMON PLEAS. 1834.

[*Reported* 10 *Bing.* 533.]

THE second count of the declaration stated, that whereas in the lifetime of David Orme, to wit, on, &c., at, &c., in consideration that the said D. Orme in his lifetime, at the request of the defendant, had then and there agreed to buy of the defendant a certain messuage and certain land and premises represented by the defendant to be free-

hold, at and for a large sum of money, to wit, the sum of £1,500, and had paid to the defendant a certain sum, to wit, the sum of £150, as a deposit and in part of the last-mentioned purchase-money; and had also agreed to pay the residue thereof, and accept a proper conveyance of the said last-mentioned premises on the 25th of March then next, on having a good and valid title made to him, the said D. Orme, to the last-mentioned premises, the defendant then and there promised the said D. Orme in his lifetime that he would procure an abstract of a good and valid title to the said last-mentioned premises to be furnished to the said D. Orme in due and convenient time for enabling him to get such title examined, and a proper conveyance of the said last-mentioned premises prepared, and the said last-mentioned purchase completed, on or before the said 25th of March; yet the defendant, not regarding his said promise, but intending to deceive the said D. Orme in his lifetime, did not nor would, although he was afterwards, to wit, on, &c., &c., at, &c., requested by said D. Orme in his lifetime, who died since the said 25th of March, so to do, procure an abstract of a good and valid title to the said last-mentioned premises to be furnished to the said D. Orme in due and convenient time for enabling him to get such title examined, and a proper conveyance of the said premises prepared, and the said purchase completed, on or before the said 25th of March, 1830, but therein wholly failed and made default, to wit, at, &c.; and the defendant then and there wrongfully and injuriously omitted to furnish any abstract of title to the said tenements as aforesaid for a long and unreasonable time, and until an insufficient and inadequate time remained for the examination of such title, and for the preparation of a proper conveyance, and the completion of such purchase as last aforesaid by the day so appointed in that behalf, according to the said last-mentioned promise of the defendant: that by means and in consequence of such neglect and omission as last aforesaid, the said D. Orme in his lifetime was deprived of all benefit and advantages that would have arisen to him from the completion of the said purchase, and was then and there necessarily put to great expenses, amounting in the whole to a large sum of money, to wit, the sum of £100, in endeavoring to procure the said title as aforesaid, and lost all the gains and profits which he might and would otherwise have made and acquired from using and employing the said sum of money so paid by him to the defendant, and other moneys provided and kept by him, the said D. Orme, for the completion of the said purchase, to wit, at, &c.

The fourth count was in substance the same.

Demurrer and joinder in demurrer on the whole declaration.

Stephen, Serjt., in support of the demurrer.

Wilde, Serjt., contra.

TINDAL, C. J. The question for the court arises on a demurrer to the four special counts of the declaration. If either of them is sufficient, the plaintiff is entitled to our judgment; and we think the second

is free from objection. The only question is, whether we can see on the face of the record a personal contract; a breach of it in the lifetime of the intestate; and a loss to his personal property. If those three circumstances concur, the case falls within the principle of *Kingdon* v. *Nottle*, 1 M. & S. 355, and our judgment must be for the plaintiff. Now, first, we have an agreement between the intestate and the defendant, by which the intestate engaged to buy of the defendant a messuage at the price of £1,500, and paid him £150 as a deposit in part of the purchase money. That purchase was to be completed by a certain day; and the defendant, having agreed to furnish an abstract in sufficient time for the completion of the purchase by that day, was requested to furnish it, and failed. The defendant outlived the time when the contract was to have been completed.

Stopping here, it appears that £150 was paid as a deposit by the intestate; that the day for completing the purchase was gone by; and that an abstract was not furnished in sufficient time for the intestate to have his conveyance by that day. Suppose the intestate himself had at that time proceeded for the breach of contract, what objection could have been taken to an action in this form?

It has been argued on the part of the defendant, that the contract, according to this record, is still open and existing; and that, though the intestate had recovered damages, he might still have brought a second action, or have proceeded in equity to enforce performance. But, after bringing an action in which the grievance alleged is the loss sustained by breach of the contract, I think it would be impossible to bring a second action, or to resort to any other means to enforce the contract, inasmuch as the first action is to be deemed an election as to the remedy sought.

This, however, is an action not by the intestate, but by his administrator; and we have still to see whether there has been any injury to the intestate's personal property. It is conceded that the allegation of such damage as the plaintiff is not entitled to claim, as for loss of contingent advantages, will not vitiate the count except on special demurrer, and may be struck out before the damages are assessed. But the count goes on that the intestate was "necessarily put to great expenses, amounting in the whole to a large sum of money, to wit, the sum of £100, in endeavoring to procure the said title as aforesaid, and lost all the gains and profits which he might and would otherwise have made and acquired from using and employing the said sum of money so paid by him to the defendant, and other moneys provided and kept by him the said D. Orme, for the completion of the said purchase."

That is an injury to the personal property of the intestate, which brings the second count within the principle of *Kingdon* v. *Nottle*. It is a circumstance not without weight, that, if the plaintiff cannot recover, there is no one who could sue the defendant. It is clear the heir could not. We think, therefore, the plaintiff is entitled to our judgment.

Park, J. This is a most discreditable defence. Ever since the case of *Lucy* v. *Levington*, 1 Ventr. 175, the decisions have been uniform on this subject; and in *Kingdon* v. *Nottle* the distinction is taken which governs all such cases as the present: Le Blanc, J., says, "The distinction which attends real and personal covenants, with respect to the course in which they go to the representatives of the person with whom the covenants are made, is a clear one: real covenants run with the land, and either go to the assignee of the land, or descend to the heir, and must be taken advantage of by him alone; but personal covenants must be sued for by the executor." And *King* v. *Jones*, 1 Marsh. 107, shows what was the opinion of the judges in such a case, for Heath, J., decided the case on the ground that no damage was sustained in the lifetime of the ancestor; in which respect he distinguished it from *Lucy* v. *Levington*.

Knights v. *Quarles* has not the least bearing against our decision on the present occasion. On all these authorities I think the point is divested of doubt; and I cannot get over the last words of *Lucy* v. *Levington*, "That though the covenant were made only to J. S., his heirs and assigns, and it were an estate of inheritance, yet the breach being in the testator's lifetime, the executor had well brought the action for the damages."

Gaselee, J. I am of the same opinion as to the second count. In *Lucy* v. *Levington* it is distinctly laid down that where there is an injury to the personal estate, the personal representative may sue; and if he cannot, in this case no one can; for it is clear the heir could not. In all the cases where the heir has sued, the action has been on a covenant; but he can have no right of action on a mere agreement to sell. In *Wotton* v. *Cooke*, Dyer, 337 b, the covenant was to the vendee and his heirs.

Vaughan, J. I entirely agree with the rest of the court. It is conceded that the record ought to disclose a breach of contract in the life of the intestate, and a damage to his personal estate; and the contest is rather as to the application of the rule to the facts of this case than as to the rule itself. Here there was a contract with the intestate to furnish an abstract by a given day; a breach of that contract; and, in consequence of that breach, the loss of the use of intestate's deposit, and of the rents from the time of the contract. After a loss of this kind, he or his representative is entitled to recover the whole amount of the damage sustained; and then he is concluded from any further proceedings. The luminous judgment of Mr. Justice Park, in *Knights* v. *Quarles*, comprehends all that relates to the subject.

Judgment for plaintiff on second and fourth counts.

RAYMOND *v.* FITCH.

EXCHEQUER. 1835.

[*Reported* 2 *C. M. & R.* 588.]

LORD ABINGER, C. B.[1] The demurrer to the first breach gives rise to this question, whether an executor can sue for the breach of this covenant, not to fell, stub up, head, lop or top, timber trees excepted out of the demise, such breach having been committed in the lifetime of the testator; and no part of the timber, loppings, or toppings, appearing to have been removed by the defendant. This question was argued in the latter part of the last term, before my Brothers PARKE, BOLLAND, GURNEY, and myself, and stood over, that we might more attentively consider how far the modern decisions, referred to on the argument, had overruled or qualified the old authorities. Those authorities are uniform, that the present representative may sue, not only for all debts due to the deceased, by specialty or otherwise, but for all covenants, and indeed all contracts with the testator, broken in his lifetime; and the reason appears to be, that these are choses in action, and are parcel of the personal estate, in respect of which the executor or administrator represents the person of the testator, and is in law the testator's assignee. And this right does not depend on the equity of the Statute, 4 Ed. 3, *c.* 7, but is a common law right, as much as the right to sue on a bond or specialty for a sum certain due in the testator's lifetime. The maxim, that *Actio personalis moritur cum persona*, is not applied in the old authorities to causes of actions on contracts, but to those in tort, which are founded on malfeasance or misfeasance to the person or property of another, which latter are annexed to the person, and die with the person, except where the remedy is given to the personal representative by the Statute law. These authorities as to actions of covenant will be found in Com. Dig. Administrator, B. 13, Covenant, B. 1; Bacon's Abridgment, Executors and Administrators, N.; and in the cases of *Mason* v. *Dixon*, Sir William Jones, 173; *Morley* v. *Polhill*, 2 Ventr. 56; 3 Salk. 109, pl. 10, which was the case of an action by the executor of a deceased bishop for a breach in his lifetime of a covenant to repair in a former bishop's lease; *Smith* v. *Simonds*, Comberbach, 64, in which an administrator *de bonis non* recovered on a breach in the time of the testator for not discharging the land from encumbrance; and lastly, *Lucy* v. *Levington*, 2 Lev. 26; 1 Ventr. 176, where the executor recovered for a breach in his testator's life of a covenant for quiet enjoyment. The old authorities are also many, that an action will lie upon every breach of contract, though not under seal. In March, page 9, pl. 23, Justice Jones said, "that it was agreed by the court, in what case soever there is a con-

[1] The opinion only is here given.

tract made to the testator or intestate, or anything which ariseth by contract, there an action will lie for the executor or administrator; but personal actions die with the testator or intestate." And in 9th Reports, 89 a, *Pinchon's Case*, in which the question was, whether an action of *assumpsit* for payment of a debt lay *against* an executor, it is laid down as follows: "As to the other objection, that this personal action of trespass on the case *moritur cum persona*, although it is termed trespass, in respect that the breach of promise is alleged to be mixed with fraud and deceit, to the special prejudice of the plaintiff, and for that reason it is called trespass on the case; yet that doth not make the action so annexed to the persons of the parties, that it shall die with the persons; for then, if he to whom the promise is made dies, his executors should not have any action, which no man will affirm; and an action *sur assumpsit*, upon good consideration, without specialty, to do a thing, is no more personal, *i. e.* annexed to the person, than a covenant by specialty to do the same thing;" and in Bacon's Abr. Executors (N), "An executor stands in the place of his testator, and represents him as to all his personal contracts, and therefore may regularly maintain any action in his right, which he himself might." These authorities have certainly been limited by the modern decisions, quoted on the argument, and are to be understood with some qualifications; but it will be found that none of those qualifications affect the present case. The rule that the executor may sue upon every covenant with his testator broken in his lifetime, has been directly qualified by the decisions in the two cases of *Kingdon* v. *Nottle*, 1 M. & Selw. 355, and 4 M. & Selw. 53, followed by that of *King* v. *Jones*, 5 Taunt. 518; 1 Marshall, 107, in which cases it was held, that, where there are covenants real, that is, which run with the land and descend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the substantial damage has taken place since his death, the real representative, and not the personal, is the proper plaintiff. These cases go no farther, and they do not apply to the present; for there is no doubt but that the covenant in question is purely collateral, and does not run with the land; for the trees being excepted from the demise, the covenant not to fell them is the same as if there had been a covenant not to cut down trees growing upon an adjoining estate of the lessor. It is a security by specialty given by the lessee to the lessor, not to commit such a trespass during the lease, which may continue beyond the lessor's life. For the breach of such a covenant after the death of the covenantee, the heir or devisee of the land on which the trees grow could not sue; the executor would be the proper party, as the covenant is collateral, and is intended not to be limited by the life of the covenantee; and if he could not sue, no one could. It is equally clear that the heir or devisee could not sue for a breach of the covenant in the time of the ancestor or devisor, and the executor therefore must sue, or all remedy is lost. These decisions, therefore, do not affect the present case. The old authorities, with respect to the right of the per-

sonal representative to sue on all contracts made with the deceased, have also been qualified by the modern decision of *Chamberlain* v. *Williamson*, 2 M. & Selw. 408, in which it was held, that the administrator of a woman could not sue for a breach of contract to marry the intestate, the declaration not stating any ground of injury to the personal estate; and in giving judgment Lord Ellenborough enumerates other instances of contracts, the breach of which imports a damage only to the person of the deceased, such as implied contracts by medical practitioners to use a proper portion of skill and attention, which cases are in substance actions for injuries to the person, and for which the personal representative could not sue; and the argument on the part of the defendant in this case was, that the same limitation of the old authorities must be applied to all contracts except such as directly relate to the personal estate, and the performance of which would necessarily be a benefit, and the breach a damage, to the personal estate of the testator, whether such contracts are under seal or not; and that upon such contracts the executor could not sue without alleging a special damage to the personal estate. The case certainly does not go that length; and we think that such an extension of the doctrine laid down in it is not warranted by law, and that it cannot be extended to a contract broken in the lifetime of the deceased, the benefit of which, if it were yet unbroken, would pass to the executor as part of the personal estate; at all events, not to such a contract under seal. The present case is one of that description — it is a case more favorable to the executors than those of *Morley* v. *Polhill*, *Smith* v. *Simonds*, and *Lucy* v. *Levington*, in which the covenant did run with the land; and if the last case is to be considered as having been decided, as was suggested in the argument before us, on the ground that the loss of rents and profits by an eviction of the testator was an injury to the personal estate (though such a ground is not intimated in either report), it is difficult to say that the loss of the shade and casual profits of trees is not equally so. We therefore think that our judgment must be for the plaintiffs. *Judgment for the plaintiffs.*

Sir W. W. Follett, in support of the demurrer.

W. H. Watson, contra.

ELLIOTT *v.* KEMP.[1]

EXCHEQUER. 1840.

[*Reported* 7 *M. & W.* 306.]

PARKE, B.[1] This case was argued a few days ago, on showing cause against a rule *nisi* to enter a verdict for the plaintiff.

The facts were these: The plaintiff, Mrs. Elliott, was the administratrix of her late mother Mrs. Lane, who was also the mother of the

[1] The opinion only is here given.

defendant's wife. Mrs. Lane's husband died in November, 1827. His household furniture was removed after his death by his widow to another house, in which she took up her residence with her daughter Mrs. Elliott: a small part, for which there was not room in that house, was sent to the defendant's. In October, 1829, the furniture and the effects of Lane were valued by Mrs. Lane, in order to take out administration to her husband, which she afterwards did, and died in July, 1832. The furniture at Mrs. Lane's was used by her; and some leaseholds of her late husband's were sold, but whether the proceeds were applied to the payment of her husband's debts, what was the amount of these debts, and whether Mrs. Lane had any funds of her own to pay them with, did not appear. After the death of Mrs. Lane, in 1838, the furniture, formerly Lane's, was sold, with Mrs. Elliott's concurrence, by order of the defendant; and some dispute having taken place about the proceeds between the parties entitled, Mrs. Elliott, in 1840, took out administration to her mother, and brought this action in that character for the conversion, which took place by the sale in 1838.

On the trial, it appeared to me that the plaintiffs were not entitled to recover, but that administration *de bonis non* should have been taken out of the estate of Mrs. [Mr.?] Lane. My Brother Bompas contended, that as the defendant was a wrongdoer, he could not dispute the title of Mrs. Lane and the administratrix. This point was reserved. He also contended, that, at all events, there was evidence to go to the jury that Mrs. Lane had become entitled in her own right to the furniture afterwards sold. I should have left that evidence to the jury, but it was agreed on both sides, that it should be submitted to the court above, and its effect determined by us, as well as the point of law which was reserved. On the motion for a new trial, the same objections were made, and very ably argued.

It is unnecessary, in this case, to decide the question, whether, in an action of trespass or trover for *personal* property, the simple fact of possession, which is unquestionably evidence of title, is *conclusive* evidence, and constitutes a complete title, *in all cases*, against a defendant who is a mere wrongdoer, as it does in actions of trespass to real property, and in those actions for injuries to personal chattels, in which the plaintiff had a special property in such chattels; for in the present case the plaintiffs were not in possession of the chattels, the subject of this suit, at the time of the conversion; and the only way in which this action can be supported, is by virtue of the relation which takes place by law to the death of the deceased, in favor of his personal representative, in all cases of intermediate injury to his chattels. But the title of the plaintiff as personal representative of Mrs. Lane, relates back to her death, with respect to those chattels only which were her own, and which vest in her administrator; and the simple question then is, whether the chattels in question were her own property. If they were not, the plaintiffs have no title whatever to them, and cannot maintain this action.

It was ingeniously contended, that, even admitting that the effects were not Mrs. Lane's own, still the administration bond, into which Mrs. Lane no doubt entered, gave a sort of custody or special property in her husband's effects unadministered, until an administration *de bonis non* should be taken out: which special interest would enable him to maintain an action for their conversion after her death. But we are clearly of opinion that such is not the effect of the bond; her own administrator is liable to the extent of her assets, for all breaches of the condition of the bond: but he has no right or interest in the unadministered effects, all of which devolve on the administrator *de bonis non* after the death of the administratrix.

The only question then is, whether those chattels, which were formerly the husband's, became, by any means, his widow's in her own right: and this is the question of fact which we have to dispose of, by the consent of the parties, instead of the jury.

The administratrix might have acquired a title by payment of the debts of the intestate to an equal value with the chattels, *or by taking those chattels*, by an agreement with the next of kin intituled under the Statute of Distribution, *or even without such agreement*, by appropriating them to herself as her own share. There was no direct proof either of payment of debts by Mrs. Lane, or of any division of the effects, by agreement with the next of kin, or otherwise; and we think that we are not warranted in this case in inferring any of these circumstances, from the simple fact of the possession by Mrs. Lane for two years and a half, and the use of the furniture. Her possession, and still more the use of these chattels, is no doubt evidence of title in her own right; and if there was no other proof in the case, would unquestionably be sufficient: but when it appears that the goods were her husband's at his death, and her possession that of an administratrix, it becomes a question upon all the facts, whether she had acquired a title or not in her own right: and we are not satisfied that she did. For anything that appears in the case, we think the goods would, at the time of the alleged conversion, have been liable to an execution at the suit of a creditor of the husband. A little more evidence might have given a different complexion to the case; but upon the facts in proof, we think we are not warranted in coming to any other conclusion, than that the property remained uncharged; and therefore the rule must be discharged.

Rule discharged.

Humfrey showed cause.

Bompas, Serjt., and *Gurney*, in support of the rule.

RICKETTS *v.* WEAVER.

EXCHEQUER. 1844.

[*Reported* 12 *M. & W.* 718.]

COVENANT. The declaration stated, that heretofore, to wit, on &c., in the lifetime of William Lloyd, deceased, and Betty his wife, by an indenture made between the said W. Lloyd and Betty his wife, of the first part, A. Stallard of the second part, and the defendant and one J. Bates of the third part, a certain messuage and lands were demised by the said William Lloyd and Betty his wife, to the said A. Stallard, to hold the same for the term of one whole year, if the said Betty should so long live, and after the expiration of the said term of one year, from year to year, so long as both parties should agree as to the rent; that the said A. Stallard thereby covenanted with the said W. Lloyd and Betty his wife, amongst other things, to keep and leave in repair the said messuage and premises; the defendant and the said J. Bates also covenanted with them, the said William Lloyd and Betty his wife, that in case he the said A. Stallard, his executors, &c., should be guilty of a breach of any of the covenants in the said indenture mentioned, on his and their part to be observed and performed, he the defendant should and would, on demand, pay and discharge all costs, charges, and expenses that should or might accrue by reason of such defaults, and should and would, in all respects, be liable as though he, the defendant, were the real and *bona fide* tenant of the said premises. The declaration then averred, that Stallard entered upon the premises, and that the said Betty died in the lifetime of the said William Lloyd; that the said A. Stallard did not keep the said premises in repair during the said term, and by means thereof the said premises, in the lifetime of the said William Lloyd, sustained damage to the amount of £200, and that the said William Lloyd had, by reason of such defaults, incurred liability to great costs, charges, and expenses, of all which premises the defendant had notice, and was requested to pay the same. Breach, non-payment thereof.

Plea, that, before the said demise in the declaration mentioned, the said William Lloyd and Betty his wife were seised in their demesne as of freehold, in right of the said Betty, for the term of her natural life, in the said messuage and lands; and that they the said William Lloyd and Betty his wife had not any further or other interest in the said demised premises; and that the said William Lloyd was not in his lifetime put to, nor did he incur liability to, the said costs, charges, and expenses in the declaration mentioned, or any part thereof.

Special demurrer, assigning for causes (*inter alia*), that the plea confessed a breach of the several covenants set forth in the declaration, without showing any answer to or excuse for committing them: That

the plea gave the go-by to that branch of the covenant, by which the defendant stipulated for his individual liability in all respects as if he were himself the real and *bona fide* tenant: That the plea did not answer the declaration even to the extent of nominal damages; and that it was consistent with every allegation contained in the plea, that the personal estate of William Lloyd had sustained damage by the alleged and admitted breaches of covenant. Joinder in demurrer.

Barstow, in support of the demurrer.

J. Henderson, contra.

Pollock, C. B. I think this case must be governed by that of *Raymond* v. *Fitch*, and that, after the decision in that case, it is impossible to say, that this action is not maintainable. My Brother Parke there cited *Morley* v. *Polhill*, 2 Ventr. 56, as showing that an executor was entitled to sue for a breach of covenant to repair, in the lifetime of the testator. That case was endeavored to be distinguished by Sir William Follett, on the ground that there was a covenant to repair; so that it was admitted, that in the case of a covenant to repair, broken in the lifetime of the lessor, an action could be maintained by the executor. I think, therefore, that the case of *Raymond* v. *Fitch* is a direct authority, and that our judgment must be for the plaintiffs.

Parke, B. I am of the same opinion. If the action can be maintained on that part of the covenant which states that the defendant shall be liable as if he were himself the tenant, the plea is bad; because it does not answer that part, but only the other branch of it, as to the payment of the expenses incurred by the testator. The question, therefore, is reduced to this, whether an executor can sue for the breach of a covenant to repair in the lifetime of the lessor, who was tenant for life, without averring special damage. On that point, *Raymond* v. *Fitch*, in which all the cases were considered, is an authority directly in point, and ought not to be shaken. The result of that case is, that unless it be a covenant in which the *heir alone* can sue (according to *Kingdon* v. *Nottle*, 1 M. & Sel. 355, and *King* v. *Jones*, 5 Taunt. 518; 1 Marsh. 107) for a breach of the covenant in the lifetime of the lessor, the executor can sue, unless it be a mere personal contract, in which the rule applies that *Actio personalis moritur cum persona.* The breach of covenant is the damage; if the executor be not the proper person to sue, the action cannot be brought by any one.

Alderson, B., and Rolfe, B., concurred.

Judgment for the plaintiffs.

POTTER *v.* METROPOLITAN DISTRICT RAILWAY CO.

EXCHEQUER. 1874.

[*Reported* 30 *L. T. N. S.* 765.]

THIS was a demurrer to the plaintiff's declaration. The action was brought by the plaintiff as executrix of her late husband, Frederick William Potter, to recover compensation for the loss sustained by his estate in consequence of an accident to the plaintiff occasioned by the negligence of the defendants. The declaration stated that "the plaintiff, during the lifetime of her husband, the said F. W. Potter, became and was received by the defendants as a passenger to be safely and securely carried as a passenger from the Mansion House to the Victoria station, for reward then paid to the defendants by the said F. W. Potter, yet the defendants did not safely and securely convey the plaintiff upon the said railway, on the said journey, and so negligently and unskilfully conducted themselves in conveying the plaintiff upon the said railway on the journey aforesaid, and in managing the said railway and train in which the plaintiff was a passenger as aforesaid that by reason thereof the carriage which the plaintiff was about to enter was violently shaken, and the plaintiff was thrown down and greatly hurt and injured in her back and spine, and otherwise, and was unable for a long time to carry on and manage and assist in the business of her said husband of a restaurant keeper, as she had theretofore done, whereby the said F. W. Potter lost the benefit of the services of the plaintiff, and incurred expense in nursing the plaintiff and providing medical and other attendance for her, and lost the profit he would otherwise have made in the said business, and the benefit of the money he had expended in the same, and was put to expense in providing persons to assist him in carrying on the same in the place of the plaintiff, and the plaintiff, as executrix of the said F. W. Potter, claims," &c.

To this declaration the defendant demurred.

The plaintiff's points were: first, that the medical and other expenditure rendered necessary by the accident was an injury to the estate of the said F. W. Potter; secondly, that the plaintiff could not have sued in respect of it in her own right; thirdly, that she could not have joined in the same declaration counts in her own right, and also as executrix.

The defendants' points were: first, that the cause of action alleged in the declaration does not survive to the executrix; secondly, that the cause of action which accrued to the testator in respect of the matter alleged in the declaration falls within the rule of law *Actio personalis moritur cum persona;* thirdly, that the declaration discloses no such

injury to the personal estate as entitles the executrix to maintain this action.

Philbrick, Q. C. (*Giffard*, Q. C., with him), for the demurrer.

Murphy, Q. C. (*George Lewis* with him), *contra*, were stopped by the court.

Bramwell, B. It is clear that this action is in substance one of contract; *Alton* v. *The Midland Railway Company* shows that. In the judgment in *Knights* v. *Quarles*, it is said that, "if a man contracted for a safe conveyance by a coach, and sustained an injury by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured, though it was clear he in his lifetime might, at his election, sue the coach proprietor in contract or in tort, it could not be doubted that his executors might sue in *assumpsit* for the consequences of the coach proprietor's breach of contract." Now here there has been a breach of contract, which has caused a loss, which has fallen upon the personal estate. This demurrer, therefore, must be overruled.

Pigott, B., concurred. *Judgment for the plaintiff*.[1]

BRADSHAW *v.* LANCASHIRE & YORKSHIRE RY. CO.

Common Pleas. 1875.

[*Reported L. R.* 10 *C. P.* 189.]

Declaration in substance stated that the testator, of whom the female plaintiff was executrix, in his lifetime carried on business as a boot and shoe manufacturer, and that, in consideration that the testator would become a passenger to be carried by the defendants upon their railway on a certain journey for reward to the defendants in that behalf, the defendants promised the said testator to take due care in carrying him whilst he was such passenger. Averments, that he became such passenger and of performance of conditions precedent. Breach, that the defendants did not take due care in carrying the testator whilst such passenger on such journey, whereby he was injured, and incurred expense in medical attendance and otherwise in relation to his injuries, and was prevented from attending to his business, and from personally conducting the same and from realizing profits therein, and great loss and damage was occasioned to the personal estate of the testator.

Pleas: 1, denial of the promise; 2 and 3, denying the averment that the testator carried on business as alleged and the allegation of damage to the personal estate of the testator; 4, denial of breaches; 5, demurrer.

[1] See *Cregin* v. *Brooklyn Crosstown R. R. Co.*, 75 N. Y. 192 (1878); 83 N. Y. 595 (1881).

Issues and joinder in demurrer.

At the trial, before *Denman*, J., at the last Manchester Spring Assizes, the facts were as follows: — The female plaintiff was the executrix of the testator, and he, while travelling on the defendant's railway, had been injured by a railway accident. He ultimately died from the injuries received, and it was not disputed that he had incurred expenses for medical attendance amounting to £40, and that the loss occasioned to his estate in respect of his being unable to attend to business previous to his death was £160.

It was contended, however, on the part of the defendants, that the maxim *Actio personalis moritur cum persona* applied, and that the action was not maintainable; and, secondly, that the damages for loss of business were too remote. The verdict was entered for the plaintiffs for £200, leave being reserved to the defendants to enter a verdict for themselves or to reduce the damages on the above grounds. It was agreed that the demurrer should abide the event of the argument on the rule.

A rule *nisi* had been obtained accordingly, against which

Sir J. Holker (*Solicitor-General*) and *R. G. Williams*, Q. C., showed cause.

Herschell, Q. C., and *J. Edwards*, Q. C., supported the rule.

GROVE, J. I am of opinion that this rule should be discharged. The action is brought by the executrix of a person whose death was caused by a railway accident, in respect of damages occasioned to the testator's estate. It is to be taken that the estate was damaged, not consequentially upon the testator's death, but by his inability to attend to his business in his lifetime, the direct and natural result of the injury he suffered. It is no doubt singular that up to the case of *Potter* v. *Metropolitan District Ry. Co.*, 30 L. T. (N. S.) 765, no action of this kind appears to have ever been brought, a circumstance which has been sometimes relied on as an argument against sanctioning a new form of action. It may, however, be that this is accounted for by the comparative infrequency of accidents of this sort in former times, and the fact that until Lord Campbell's Act the right to damages for the personal injury, as compared with which the damages to the estate would generally be a small matter, was lost by the death of the party injured. The same argument might have been applied to the action in *Potter* v. *Metropolitan District Ry. Co.*, up to the decision of which case no action of the kind had ever been heard of, so far as I know, if we except the case put by way of illustration by Richardson, J., in *Knights* v. *Quarles*, 2 B. & B. 102.

The Court of Exchequer Chamber, nevertheless, held in that case that the action would lie, and by their decision we are bound, unless the present case is so far distinguishable as to render the same principle inapplicable. I am of opinion that it is not, and there is a sufficient ground of action here. The ground of action in both cases is that there has been a breach of a contract made with the testator during his

lifetime, whereby in his lifetime his estate was injured by his having to pay medical and other expenses, and injury to his business, the direct and immediate consequence of the accident.

Does the fact that, in this case, besides the injury to the estate, the testator's death has likewise resulted from the breach of contract, make any difference, or does the fact, that provision has been made in such cases for compensation in respect of the death to certain relatives by Lord Campbell's Act, take away any right of action that the executrix would have had but for that Act? It does not seem to me that the Act has that effect, either expressly or by necessary implication. The intention of the Act was to give the personal representative a right to recover compensation as a trustee for children or other relatives left in a worse pecuniary position by reason of the injured person's death, not to affect any existing right belonging to the personal estate in general. There is no reason why the Statute should interfere with any right of action an executor would have had at common law. In the case of such right of action he sues as legal owner of the general personal estate which has descended to him in course of law; under the Act he sues as trustee in respect of a different right altogether on behalf of particular persons designated in the Act. Another argument for the defendants was, that inasmuch as the remedy for the personal injury died with the person, the damages to the estate, being consequential on the personal injury, died also. I do not at all see that that follows as a necessary or logical consequence. The two sorts of damage are separable: the one is pecuniary loss to the estate immediately and naturally arising out of the accident; the other is personal to the party injured, and as such dies with the person. I do not see that there is any valid distinction between this case and that of *Potter* v. *Metropolitan District Ry. Co.*, or why the damage to the estate, that would clearly be recoverable if the injured party lived, should be the less recoverable because of his death. For these reasons, I am of opinion that the action is maintainable. With regard to the distinction between the two classes of damages, it was contended that the damages in respect of the testator's inability to attend to business were too remote within the rule in *Hadley* v. *Baxendale*, 9 Ex. 341; 23 L. J. (Ex.) 179. The decision there was, that the defendants in an action of contract are only to be liable to the natural consequences flowing directly from their breach of contract, or which may be taken to have been contemplated by the parties. It would be impossible to carry on the affairs of life if a contracting party were liable in respect of extraordinary and unknown sources of damage, a liability for which the consideration given might be wholly inadequate. This doctrine might be applied more plausibly if it were sought to recover consequential damages to the estate arising from the death, but what is here sought to be recovered is the immediate injury to the estate caused in the testator's lifetime by his incapacity to attend to business, the direct result of the accident. Such damages may well be considered as being within the contemplation of the defendants when they entered

into the contract. I therefore think that both sorts of damages are recoverable, and that this rule must be discharged.

DENMAN, J. I am of the same opinion. Whatever may be the usual form of action in such cases, it is quite clear that the declaration in this case was framed in contract. The damage alleged was damage to the estate of the testator, and at the trial two heads of damage were shown: viz., £160, damage in respect of the business, which it was agreed had suffered to that amount, and £40, medical and other expenses. I am of opinion that the plaintiffs are entitled to retain the verdict for the full amount of £200.

The first question was, whether the action can be maintained at all. The action is for a breach of contract occurring in the lifetime of the testator, but which ultimately caused his death. And it was urged that the case fell within Lord Campbell's Act, that the only action that could be brought was under that Act, and that these damages could not be recovered as damages to the estate. This appears, no doubt, to be the first case of similar damages being sued for in an action like the present, but there is considerable authority for holding as we do.

In Williams on Executors, vol. 1, pp. 798, a work in itself of great authority, all the cases on the subject are commented upon and the law is stated entirely in accordance with the *dictum* of Richardson, J., in *Knights* v. *Quarles*. It is distinctly laid down that an executor may recover damages to the personal estate arising out of a contract, though an action of tort might have been brought for the personal injury, resulting from the same act of the defendant, before the death of the testator. The case of *Alton* v. *Midland Ry. Co.*, 19 C. B. (N. S.) 213; 34 L. J. (C. P.) 292, is also referred to in a note; and it is clear the learned author, who was a judge of this court, when that case was decided, looked upon the *dictum* of Willes, J., in that case as a confirmation of the opinion of Richardson, J., in *Knights* v. *Quarles*. He proceeds, however, to say that the rule there laid down must be taken to be limited by a qualification introduced by the modern decision of *Chamberlain* v. *Wilkinson*, 2 M. & S. 408, viz., that an action by the executor for breach of contract will not lie where the damage is purely personal, and there is no damage to the estate. In that case the action was for breach of promise of marriage, and the decision turns distinctly on the ground that there was no special damage stated on the record, and so the executor could not have an action because the only damages recoverable were purely personal. Here, the damages are not personal in their nature, but are damages to the estate, and the case falls therefore within the rule as laid down by Sir Edward Vaughan Williams, and not the exception. Again, the case of *Potter* v. *Metropolitan District Ry. Co.*, though not exactly in point, is to some extent an authority in favor of the view we take. In one respect it was a stronger case, for it was doubtful there whether the declaration was in contract, whereas it clearly is so here. There the wife was the person

to whom the injury was done, and she sued as executrix to her husband who had died, in respect of the damage to the personal estate. The case was not, therefore, one of personal injury ultimately causing death, and consequently is not on all fours with the present. The principle, however, of the decision is quite consistent with our judgment in this case. The rule to enter a nonsuit must for these reasons be discharged.

Then, it being admitted that if the action lies the £40 can be recovered, the only question that remains is, whether the £160 for loss of business can be recovered. It was said that the rule in *Hadley* v. *Baxendale* prevents this amount being recovered. I do not think so. Every plaintiff is entitled to recover the damages that are the natural consequence of a breach of contract. I apprehend that where the contract is to carry a particular man, A. B., safely, and by reason of the breach of such contract A. B. is personally injured, any damage actually caused to the estate of A. B. by his consequent incapacity to attend to business is a natural consequence of the breach of contract, and not too remote, or one which the defendants could say that they did not contemplate. The case is essentially different from that of a contract for the supply of a chattel. It was not suggested at the trial that the damage in question had not actually occurred, or could in any way have been mitigated by hiring a substitute, or otherwise. It appears to me, therefore, that the rule must be discharged on this point also.

Rule discharged.[1]

PULLING *v.* GREAT EASTERN RAILWAY COMPANY.

Queen's Bench Division. 1882.

[*Reported* 9 *Q. B. D.* 110.]

Statement of Claim was in substance as follows: —

The plaintiff was the administratrix of Edward Pulling, deceased, her husband, and he had commenced the action in his lifetime. By an order of the court the plaintiff had been substituted as plaintiff in the action in place of the said Edward Pulling, deceased. The plaintiff alleged that the said Edward Pulling while crossing the defendants' railway by a level crossing on a highway was, by and through the negligence of the defendants in and about the working of the defendants' railway and the management of an engine of the defendants, knocked down and run over by the engine, and sustained personal injuries. It

1 "With the single exception, so far as I am aware, of the case in the Common Pleas, *Bradshaw* v. *Lancashire & Yorkshire Ry. Co.*, there appears to be no authority that an action will lie by the executor in respect of what is claimed in this action." — *Per* Mellor, J., in *Leggott* v. *Gt. N. R. Co.*, 1 Q. B. D. 599, 605 (1876).

"I yield to the decision in the Common Pleas, but without assenting to it." — *Per* Quain, J., *Id.* 607.

was further alleged that in consequence of the aforesaid injuries the deceased was forced to leave his employment, and was prevented from the time when he was so injured until his death from following his occupation, and from deriving therefrom the wages and profits which he otherwise might and would have earned and acquired, and he also incurred expenses in obtaining medical attendance and nursing and otherwise during his illness, and at the time of his death his personal estate and effects were much diminished in value by reason of the circumstances aforesaid.

Demurrer.

Lush Wilson, for the defendants, in support of the demurrer, was stopped by the court.

Clay, for the plaintiff, in support of the statement of claim.

DENMAN, J. I think that our judgment must be in favor of the demurrer. This action is clearly an action of tort, the cause of action alleged being the negligent management by the defendants of their railway and engine, whereby the original plaintiff sustained personal injury. The present plaintiff, his administratrix, alleges that the effect of the tort was to cause him to incur medical expenses before his death, and in respect of those expenses it is contended that the action is maintainable. I do not think that we can hold this action maintainable without in practice entirely abrogating the doctrine of law expressed in the maxim *Actio personalis moritur cum persona*. To a certain extent that doctrine has been qualified. Under the Statute of Edward III. it has in many cases been held that, where the cause of action, whatever its form may be, is in respect of a tortious impairment of the personal estate, such action may be maintained by the personal representative. But none of the authorities go so far as to say that, where the cause of action is in substance an injury to the person, the personal representative can maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury. The case of *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.*, Law Rep. 10 C. P. 189, certainly does not go to that length, because the judgments in that case are expressly based upon the distinction in this respect between actions of contract and actions of tort, and upon the fact that in that case the action was an action of contract. The case of *Leggott* v. *Great Northern Ry. Co.*, 1 Q. B. D. 599, was decided upon the same principle as *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.*, though Quain, J., expressly dissented from the decision in that case so far as his personal judgment was concerned, and Mellor, J., did not express any approval of it, but considered himself bound by it as an authority. There was not anything said in the judgments in *Leggott* v. *Great Northern Ry. Co.* to warrant our going to the length to which we should be going if in the present case we held that the maxim *Actio personalis moritur cum persona* did not apply. The duty, for breach of which the action was brought in that case, arose out of a contract, and the action was in substance for breach of contract to use due care

towards the passenger whilst waiting for his train on the platform. Some of the expressions used by the judges in the case of *Twycross* v. *Grant*, 4 C. P. D. 40, seem no doubt to go to considerable lengths, but those expressions must be construed with reference to the cause of action in that case. The cause of action there was not an injury to the person, but in respect of the pecuniary damage done to the intestate's estate by reason of the failure to perform the statutory obligation to disclose certain contracts. The present is an altogether different case. Here the tort complained of is an injury to the person arising from the defendants' negligence. There is no decision which supports the proposition that, because in consequence of such injury the person injured is put to expense, the case is brought within the category of cases to which the Statute of Edward III. applies. Medical expenses are almost always made an element of damage in actions for injury to the person, but it has never before been suggested that the personal representative could maintain an action on the strength of such expenses. For these reasons I think our judgment must be for the defendants.

POLLOCK, B., concurred. *Judgment for the defendants.*

ARNOLD *v.* LANIER.

SUPREME COURT OF NORTH CAROLINA.

[*Reported* 1 *Car. Law Repository*, 529.]

THE plaintiff declares in deceit, for, that defendant's testator sold to him, as sound, a negro which he knew to be unsound. The defendant pleads that her testator was not guilty, and that she had fully administered, &c. The jury found her testator guilty, assessed damages, and that she had fully administered. It is referred to the Supreme Court to say what judgment shall be entered. The plaintiff wishes to proceed against the real estate.[1]

SEAWELL, J., delivered the opinion of the court.

The Act of 1799, chap. 18, § 5, declares that no action of detinue or trover, or action of trespass, where property, either personal or real, is in contest, and such action of trespass is not merely vindictive, shall abate by the death of either party. This is an action of trespass, though not *vi et armis*, and the passions and feelings have no concern. It is, in substance, to recover for an act done by the defendant's testator, whereby he has been made richer, and the present plaintiff poorer.

Wherefore, we are all of opinion that the plaintiff is entitled to judgment, and that *scire facias* be awarded against the testator's heirs and devisees.[1]

[1] See, *accord.*, *Baker* v. *Crandall*, 78 Mo. 584 (1883); and cf. *Tichenor* v. *Hayes*, 41 N. J. L. (12 Vroom) 193 (1879). But see *Brackett* v. *Griswold*, 103 N. Y. 425 (1886).

READ *v.* HATCH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1837.

[*Reported* 19 *Pick.* 47.]

THIS was an action on the case, brought by the plaintiffs, merchants in Boston, against the defendant, who resided in Bangor, Maine, charging that the defendant falsely and fraudulently recommended another person as a trader in good credit and worthy to be intrusted with goods, by means of which the plaintiffs were induced to sell him goods on credit, and thereby sustained damage.

At or before March Term 1836, the defendant pleaded in abatement the pendency of an action for the same cause, in the State of Maine; to which plea there was a general demurrer; and the cause then stood for argument.

Subsequently to the 1st of May, 1836 (when the Revised Statutes took effect), the defendant died, and the plaintiffs moved to cite in his administrator.

Morey, for the plaintiffs.

S. D. Parker, as *amicus curiæ*, *contra*.

SHAW, C. J. The question whether the plaintiffs can cite in an administrator and proceed with their action, depends on Revised Stat. *c.* 93, § 7. It is contended that a false representation, by which one is induced to part with his property, by a sale on credit to an insolvent person, by means of which he is in danger of losing it, is a damage done to him in respect to his personal property. But we are of opinion that this would be a forced construction, and not conformable to the intent of the Statute. If this were the true construction, then every injury by which one should be prevented from pecuniary gain, or subjected to pecuniary loss, would, directly or indirectly, be a damage to his personal property. But we are of opinion that it must have a more limited construction, and be confined to damage *done* to some specific personal estate, of which one may be the owner. A mere fraud or cheat, by which one sustains a pecuniary loss, cannot be regarded as a damage done to personal estate.

The action is abated at common law, by the death of the defendant, and not surviving by force of the Statute, must be deemed to stand abated.

CUTTING *v.* TOWER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1859.

[*Reported* 14 *Gray*, 183.]

ACTION of tort for fraud and deceit in selling to the plaintiff's intestate eight bushels of damaged and poisoned corn meal, which caused the death of the intestate's horses when given to them as food.

At the trial in the Superior Court of Suffolk at March Term, 1858, the defendants objected that this action did not by law survive to the plaintiff. *Huntington*, J., overruled the objection, the jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

J. G. Abbott and *F. A. Brooks*, for the defendants.

M. G. Cobb, for the plaintiff.

BIGELOW, J. This case falls within the general rule that actions of tort do not survive. The exception created by the Rev. Sts. *c.* 93, § 7, that actions for damage done to real or personal estate shall survive, was intended to include only those cases where injury is occasioned to property by the direct wrongful act of a party, and not where it results incidentally or collaterally therefrom, or from the doing of some other act, or the happening of some subsequent event over which the wrongdoer has no control. The gist of the action in the present case is the fraud and deceit practised by the defendants on the plaintiff's intestate in the sale of merchandise. For this an action to recover damages would have laid in his favor whether the meal which he purchased had ever been used or not. It was not therefore the fraudulent representation of the defendants, which operated directly to the injury of any personal property. It was the use to which the meal was put, that caused the damage for which the plaintiff now seeks to recover. But that was not the act of the defendants. It was only a pecuniary loss resulting incidentally from the sale of the meal. Suppose the meal, instead of being used by the plaintiff's intestate to feed his horses, had been made into bread for his family, and caused great sickness and suffering and loss of time to him and others. It would hardly be said that an action in such case would survive under St. 1842, *c.* 89, for damage to the person. The provisions of the Statutes allowing actions of tort to survive have been strictly construed, so as not to extend the exceptions beyond the clear intent of the Legislature. *Read* v. *Hatch*, 19 Pick. 47; *Nettleton* v. *Dinehart*, 5 Cush. 543.

Exceptions sustained.

WYMAN *v.* WYMAN.

COURT OF APPEALS OF NEW YORK. 1863.

[*Reported* 26 *N. Y.* 253.]

APPEAL from the Supreme Court. The facts proved on the trial were these: John R. Wyman, the plaintiff's intestate, died in January, 1859, seised of a hotel, on which he had effected insurance to the amount of $3,000. The policies ran to Wyman, "his executors, administrators, or assigns," and contained this clause, "the interest of the insured in this policy is not assignable unless by consent of this corporation, manifest in writing, and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall be void and of no effect." Wyman died wholly insolvent, leaving a widow, the plaintiff, who took out letters of administration, and two children, his heirs-at-law, who were defendants. In October succeeding Wyman's death the insured property was destroyed by fire. The insurers adjusted the loss and paid the amount to David B. Prosser, Esq., who had been appointed guardian of the infant heirs, under a stipulation entered into by all the parties concerned that Prosser should hold the money subject to the direction of the court, to be paid to the parties to whom it might be adjudged to belong, the heirs, the administratrix or certain creditors, who, before the intestate's death, had recovered judgment against him, which was a lien on the insured property for an amount exceeding its value. Prosser insisted upon his right to hold the money for the heirs, and the action was in the nature of a bill of interpleader to try the right of the several parties. The decision of the Supreme Court, at General Term in the Seventh District, was that the plaintiff, as administratrix of Wyman, was entitled to the money, and not the heirs-at-law. From this judgment Prosser, as guardian of his wards, appealed to this court.

David B. Prosser, for the appellants.

John H. Reynolds, for the respondents.

EMOTT, J. The condition in the policy which is cited by the appellants refers to assignments or transfers of the policy itself or of the interest of the assured therein, and not to transfers of the title to the building insured, or the land on which it stood, whether such transfers are voluntary or by operation of law. The clause is to the effect that the interest of the assured in this policy is not assignable; and it is a transfer or termination of the interest of the assured in the policy, and not in the premises insured, which, when made without consent, is to avoid the policy under this condition.

Policies of insurance against fire, however, are personal contracts with the assured. They are agreements to indemnify him against loss,

and not guarantees of the immunity of the property insured. Such contracts do not attach to the realty, nor do they pass as incident to a conveyance or transfer of the title to lands. In the present instance, as ordinarily with us, in policies of insurance against fire, the contract is made with the assured, "his executors, administrators, and assigns." Both by force of these words, and from the nature of the contract itself, the right of action upon the policy at the death of John R. Wyman vested in his personal representative. It is not easy to see how any one but his administratrix, the present respondent, could have sustained actions on these policies which had been issued to John R. Wyman, for any loss, whether it had occurred before or after his death. It would have been a sufficient answer to any such action by the heirs, upon a policy of insurance, that it was a personal contract to which they were not parties, and that the right of action which it gave passed upon the death of the original assured to his personal representative, who not only succeeded to all his mere rights of action, but was specifically named in this contract itself.

This, however, is not an action to recover on a policy for a loss; nor is the question between the insurance companies and these parties, or either of them. The companies have indeed, as far as it lay with them, waived any condition in the policies, or any objection to the payment of the loss. The insurance money was paid to David M. Prosser, under a stipulation by which he became in effect a stakeholder, and by which the ultimate disposition of the money is left to the judgment of the courts upon the rights of the parties. The present is an equitable action to ascertain and determine those rights. The plaintiff claims this money as personal property and part of the assets of the estate of John R. Wyman, to which she is not only primarily but absolutely entitled as his administratrix; while the defendants insist that it belongs to them as his heirs-at-law, and the owners of the real estate upon which the building stood which was insured in the policies. It results that although we are not required formally to determine whether an action could have been sustained against the insurance company by either of these parties, yet the controversy between them cannot be determined except by ascertaining their legal or equitable rights to the amount due by the contract of insurance.

I have already intimated the difficulties in the way of an action to recover the insurance money by the heirs. On the other hand, it is said by the heirs that the administratrix could not have sustained such an action, because she had no interest in the property insured. It is unquestionable that the assured must have an insurable interest in the premises covered by the insurance at the time of the loss. But in the present case the title and interest in the lands, and with it the ownership of the building, passed to the heirs; yet, as we have seen, the right of action upon the contract vested in the administratrix. These parties are not strangers to each other, however, but both of them derive title from the intestate by a devolution or transfer, which is not

only not forbidden but is recognized by the policy. The policy does not avoid the contract upon the transfer of the title to the property by descent to the heir, and the devolution of the right of action to the administratrix, but expressly preserves the right of action, and continues and extends the privileges of the agreement to the executors and administrators of the assured. An action may be brought upon the contract of insurance by the latter as the successor of the original party, and as named in the instrument itself, to recover damages for the destruction or injury of the interest of the former in the property insured. Thus the contract of insurance by the death of John R. Wyman became by its terms a contract with his administratrix for the protection of the interest of his heirs. So that the right of action became vested in one person, while the interest in the property insured, which was requisite to sustain the action, belonged to another. The administratrix would thus have sustained her action upon the policy as a person with whom a contract is made for the benefit of another. She would have been regarded as a party to whom, as a trustee of an express trust, the right to sue in her own name is preserved under the Code, § 118. The case would fall within the decision of *Considerant* v. *Brisbane*, 22 N. Y. 389. See *Freeman* v. *Fulton Fire Insurance Company*, 14 Abb. 404.

But it is difficult to reconcile the claim of the respondent to hold this insurance money, as part of the personal assets of the deceased, with this reasoning. The doctrine contended for by the appellant's counsel that not only the right of action, but the beneficial interest in the contract with the insurers, passed to the administratrix at the death of John R. Wyman, fails when it is put to this test. She had no legal estate and no beneficial interest in the premises. The title to the contract, and to a recovery upon it, was vested in her by the operation of law, and not by express assignment or transfer. She is, of course, a trustee for creditors of the assets in her hands, but not of the lands of the deceased, nor of a contract like this, which is for the indemnity of those who have the beneficial interest in the lands. Upon the reason of the matter it is equally evident that the beneficial interest in such a contract of insurance belongs to the heir and not the personal representative of the deceased. The heir is the absolute owner of the property, entitled to its income and its enjoyment, and damnified by its destruction. He only can bring an action for any damage done to it after the title has passed to him from his ancestor. If the destruction of this building by fire had been the result of the malice or carelessness of another, the heirs of John R. Wyman would have had their action against such person and recovered damages for the very loss against which this contract is an indemnity. They could have destroyed, removed or sold the building at any time, and neither for such an act nor for any injury by a third person, could the administratrix have sued at all. Her rights rest upon the contract of the insurers exclusively; and that is a contract, as I have already said, not of guaranty

against the destruction of the property, but of indemnity against a loss to the person injured by such destruction. It follows that it is a contract which, even if made or continued with her, is, in truth, for the benefit of the parties to whom that property belonged. The building which was burned was real estate. As such it vested in the heirs immediately upon the death of the intestate, and its subsequent injury by fire could not convert it into personal estate, so as to divest the right of the heirs or give a new direction or character to the money payable by way of indemnity for their loss. Again, it was a part of the contract of insurance in this case, as is usual in policies of insurance against fire, that upon the destruction or injury of the property the insurers, if they chose, might repair or restore it in specie. If they had elected to take that course the expenditure which would thus have been made would, of course, have been entirely for the benefit of the heirs. The building repaired or replaced would have been theirs, because standing upon their lands. The theory of the payment of money in lieu of such actual reparation, is that the party is thus enabled to replace what has been destroyed for himself instead of its being done by the insurers. This is very plain in the case of a partial loss where there is only an injury and not a destruction of the premises insured, but it is equally so in all cases. It would be a singular result if the election of the insurers could determine whether the heirs or the administratrix should take the benefits of their contracts; whether they would make compensation in money to the latter, or in kind to the former. And it is a strong implication from the existence of such a feature in the contract that its benefits must, in any event, and in either form of performance, inure to those who would, in the case of its literal performance, reap its fruits. My opinion is that in such a case as this the executor or administrator is a trustee for the heir who alone has been damnified, who has sustained the loss, and who is entitled to the indemnity.

It is supposed that such a construction of the contract and of the rights of the parties will be in conflict with the authorities. It is somewhat remarkable that so few cases can be found in which a question of such interest, and which must frequently arise, has been considered. An attentive examination of the few decisions to be found bearing upon the question, will show that they do not really contradict the views which have now been expressed. The difficulties which have been found, and are stated by text writers, grow out of the character of the question, and the peculiar relations of the parties to the subject, rather than from judicial decisions. A leading case, which is much relied on in favor of the right of the personal representative, is *Mildmay* v. *Folgham*, 3 Ves. 471, in which Lord Chancellor Loughborough makes use of the strong expression, "it is impossible to make the executor a trustee." But that case was decided upon its special circumstances, and cannot be cited to control others which are not in all respects similar. Judith Tucker had insured a house by becoming a member of a company

formed by deed for purposes of mutual insurance. She received a policy declaring that certain persons named as trustees would pay to her or her personal representatives, in accordance with the deed, any loss or injury to her property within seven years, and at the end of that time, if no loss occurred, would repay her deposit. The deed provided against survivorship to those remaining, in the event of a death of any person becoming a party to it; and that, in such event, the interest in the deed, and in the association, of a member dying, should survive to his personal representatives, who thereby became members of the company. It was also provided that, if the interest or property in the house insured of any person should expire, inasmuch as the insurance thereby became void, such person could adjust his account and have the deposit repaid him, and that the person succeeding to the property might come in and renew the insurance, becoming a member of the association in turn. The suit was a bill filed by the heir against the trustees named in the policy: that is, in effect, against the association. The Lord Chancellor held that this was a partnership, or a *quasi* partnership, and that no person could claim its benefits unless he was a member of the society according to its terms, which, he says, were very intelligible and consistent. The effect of the articles in his view evidently was, that the right to their benefits could only survive to the personal representatives, and no one else could succeed to the membership of the original assured. If the interest in the property insured passed to executors, no benefit was taken by the survivors from his death: the interest survived; and the right of membership attached to the representatives by force of the deed of partnership. If, however, the interest in the insured property did not vest in the executor, the only right which remained, according to the deed of insurance, was the right to claim a return of the deposit, which, he says, was with the executor, with whom the account must be made up. The heir or devisee could only come in anew and insure, or become a member of the society on his own account. In other words, the construction put upon the scheme of insurance exhibited by the policy, and the deed of association in that case, was, that by the death of the assured, and the transmission of her interest to a person who was not, and was not entitled to become, by succession, a member of the society, the insurance terminated, and the only rights of the executors and the heirs were a return of the deposit to the one, and a reinsurance by the other. The right of the executors to claim the insurance money upon a loss was not before the court; but the reasoning of the judgment, applied to the facts of the case, is equally fatal to the claim of the executor and of the heir against the company.

There is a case decided by Sir Lancelot Shadwell, Vice-Chancellor, *Parry* v. *Ashley*, 3 Sim. 97, in which he held that the proceeds of a policy of insurance might be affected with a trust in favor of the parties entitled to the real estate. In that case certain real estate was charged with an annuity, and, subject to that, given to the defendant, who was

sole residuary devisee and legatee and also executrix. The buildings were insured, and after the testator's death the executrix renewed the policy. They were burned, and it was held that the insurance money should be regarded as real estate, and preserved for the benefit of the annuitant, and not be disposed of by the executrix as general personal assets.

Haxall v. *Shippen*, 10 Leigh, 136, is an exceedingly well considered case in the Court of Appeals of Virginia. One Shore died leaving a plantation by will to his widow for life, and remainder to his children. There was an insurance on the buildings, running to him, his heirs and assigns. The widow occupied the house and the policy was kept in force. She married Haxall, and afterwards the buildings were destroyed by fire. A suit in equity was brought upon the policy by Haxall and wife, and a decree made that the insurance money be paid to them, on their giving bonds to pay the principal to the children and heirs of Shore, at the death of their mother, Mrs. Haxall. The bond was given and the money received, and then used in rebuilding the house. At the death of Mrs. Haxall, suit was brought upon the bond, when the sureties commenced this action to stay its prosecution, on the ground that, by the expenditure of the money in rebuilding, the heirs had already had the benefit of it. The court held that the decree in the first suit, and the action of the parties under it, by giving the bond and receiving the money, was conclusive as to the rights of the parties, and that the subsequent application of the money in rebuilding was voluntary and could not prejudice the heirs. This was all which was necessary to the disposition of the case, although the opinion discusses the rights of the parties, independent of the first suit and judgment. The case was not like the present, as the policy ran to the assured, his heirs and assigns, and was regarded as a covenant real. An adjudication in favor of the heirs could not, therefore, be cited as in point in a case where the policy was a purely personal contract. But, on the other hand, the reasoning of the court is not against the view which we take of the rights of the heirs in such a case. The proceeds of the insurance are, indeed, alleged to be money, and not lands, and not affected with any trust which would defeat creditors and require their use in rebuilding. But, at the same time, they were not considered to have been so entirely converted into personalty as to become the property of others than the owners of the insured property at the time of its destruction. It may be that the judges of that court would have so held in a case like this; but we are not obliged to dissent from their decision, or even to quarrel with their reasoning, as far as they went, in the case before them.

The case of *Carter* v. *Rockett*, 8 Paige, 437, was between a mortgagee and the owner of property insured; and no question like the present arose. The owner had the entire interest both in the contract and the premises, and the only question was whether a mortgagee had by his mortgage merely a specific lien upon the money due to his mort-

gagor by the policy, simply because he had a lien upon the land, and because the value of his security was diminished by the destruction of the buildings.

So far as we have thus considered the rights of these parties, and so far as their rights as against each other are concerned, the heirs-at-law are equitably entitled to this fund. If there had been no other allegations or proofs in the case, than such as we have thus far adverted to, the judgment of the Supreme Court would have been erroneous and must have been entirely reversed. The claim of the plaintiff to this fund as part of the ordinary personal assets of the deceased cannot be supported.

But there are other equities which it is necessary to consider. It was alleged and proved that the deceased died largely in debt and probably insolvent, and that the heirs were irresponsible. It was found by the judge who tried the cause that there was a judgment to a considerable amount against John R. Wyman, which was a lien upon his real estate, and was held by persons not parties to this suit. Although this insurance money is to be treated as proceeds of real estate, it is nevertheless subject, as is the real estate itself, under our laws, to the payment of the debts of the ancestor. A court having control of such funds should not allow them to pass into the hands of irresponsible and infant heirs, leaving the creditors of the deceased to pursue them by the dilatory remedy of a new and distinct proceeding. Having possession of the fund, it is proper to retain it for the purposes of a just administration among the parties entitled to it. It is usual, in cases where the proceeds of real estate come into the hands of the court, and it is shown that there are debts which the real estate was liable to pay, or to be sold in the hands of the heir to satisfy, to order the money paid over to the personal representative, for distribution so far as may be necessary, holding him to account for any balance or resulting residue to the heirs. The direction in the judgment appealed from in this case, that the money in the hands of Mr. Prosser should be paid to the administratrix, in order primarily to the payment of the debts of the deceased, need not therefore in fact be modified, except in a single particular. That particular is one of which the respondent alone in her individual capacity, and not the appellants, can complain. As the widow of John R. Wyman, she is entitled to a dower interest prior to the rights of his creditors in this fund. That should have been preserved by the judgment. It may be that any direction as to the ultimate disposition of the residue, after payment of the debts of the deceased, will be unimportant in this case. But the judgment taken with the complaint and the issue formed upon it by the answer, would imply, if not adjudge, that this money was regarded and ordered to be paid over by the court as part of the general personal estate, and should be distributed and accounted for as such. This was erroneous, and whether the error is of any practical importance to these parties or not, this also should be corrected. No account has indeed been taken

of the estate, nor are we in a situation to dismiss the appellants from a right to call for such an account of this fund or of its ultimate disposition. Their right to do so should therefore be preserved. The judgment should be modified so as to provide for the satisfaction of the dower interest of the widow in the moneys in question: for the payment of the surplus to her as the administratrix, to be applied by her in satisfaction of debts entitled to payment out of such assets in the order and manner established by law; and that the residue, if any, be divided among the heirs-at-law of the deceased according to their rights as such heirs. Neither party to have costs of their appeal.

WRIGHT and BALCOM, JJ., dissented; SELDEN, J., did not sit in the case.

Judgment modified, in accordance with above opinion.

WOLF *v.* WALL.

SUPREME COURT COMMISSION OF OHIO. 1883.

[*Reported* 40 *Ohio St.* 111.]

ERROR to the District Court of Guernsey County.

D. D. T. Cowen, for plaintiff in error.

E. W. Mathews and *White* and *Campbell*, for defendant in error.

BY THE COURT. 1. At common law an action for an injury to the person caused by the want of skill or negligence of a surgeon, although based on contract, did not survive the death of either party. *Vettner* v. *Gilman*, 48 N. H. 416; *Jenkins* v. *French*, 58 N. H. 533; *Smith* v. *Seerman*, 4 Cush. 412; *Zabriskie* v. *Smith*, 13 N. Y. 322; *Wade* v. *Kalbfleisch*, 58 N. Y. 282; *Stebbins* v. *Palmer*, 1 Pick. 79; *Lattimore* v. *Simmons*, 13 S. & R. 183; *Long* v. *Morrison*, 14 Ind. 595; *Wheatley* v. *Lane*, 1 Saund. 216: Cowp. 376; *Chamberlain* v. *Wilson*, 2 M. & S. 416.

2. "An injury to personal estate" under Section 398, Civil Code (S. & C. Stat. 1058), is damage done to some specific property of which the person is the owner. It is not damage arising incidentally or collaterally.

Judgment affirmed.

WEBSTER *v.* LOWELL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1885.

[*Reported* 139 *Mass.* 172.]

BY THE COURT. The petitioner's intestate, Mary E. Webster, was the owner of real estate situated on a public street. Before her death the city of Lowell discontinued the street. The only question which

seems to be raised in this case is whether the administrator is the proper party to petition the county commissioners or the Superior Court for a jury to assess the damages for the discontinuance.

The claim for damages is a chose in action, which the owner in her lifetime might have released by parol, and which passes to the executor or administrator, and not to the heir or devisee, or to any grantee of the land. *Patten* v. *Fitz*, 138 Mass. 456.

In this case the administrator is the proper party to bring such petition. Pub. Sts. *c.* 49, §§ 32, 105; *c.* 165, § 23.

Ordered accordingly.

F. T. Greenhalge, for the petitioner.

N. D. Pratt and *C. S. Lilley*, for the respondent, submitted the case without argument.

NOTE. — In *Cortelyou* v. *Lansing*, 2 Caines, Cas. 200, the Supreme Court of New York *held*, in opposition to some early *dicta*, that the executor of a pledgor may redeem, though the loan was for no fixed time.

In *McClure* v. *Miller*, 4 Hawks, 133 (1825), it was *held* that an action for the seduction of the plaintiff's daughter did not survive to his executor.

B. *Apportionment.*

PEARLY *v.* SMITH.

CHANCERY. 1745.

[*Reported* 3 *Atk.* 260.]

A PURCHASER from an husband of an interest in new South Sea annuities during his life, remainder to other persons, (which had been originally secured upon a mortgage, but by order of this court had been transferred to Government securities) insisted, that notwithstanding the husband died before the Christmas half-year became due, yet that he was entitled to be paid proportionably, at the rate of four per cent for the time the husband lived, from midsummer to the day of his death.

LORD CHANCELLOR [HARDWICKE]. If it had continued a mortgage, the purchaser would have been entitled to the demand he now makes, because there interest accrues every day for forbearance of the principal; though notwithstanding it is usual in mortgages to make it payable half-yearly.

But South Sea annuities are by Act of Parliament considered merely as annuities, and therefore the purchaser here is no more entitled to receive the half-year's dividend which did not become due till after the

husband's death, than he would in the case of a common annuity payable half-yearly, where the annuitant (in whose place he stands) dies before the half-year is completed.[1]

WILSON *v.* HARMAN.

CHANCERY. 1755.

[*Reported* 2 *Ves. Sen.* 672.]

BY articles, money was to be laid out in land, and until laid out to be vested in South Sea annuities, the profits to go in the same way as the rent of the land would. The person, who would be tenant for life if laid out in land, dies in the middle of a quarter. On petition the question was, whether there should be an apportionment between the representative of the tenant for life and the remainder-man.

That there should be was cited from Viner, Title Apportionment, Letter F, a case where it was done by Sir Joseph Jekyl on petition by the administratrix of John Holt, son of the Chief Justice, against the remainder-man, where the residue of the Chief Justice's personal estate was to be laid out in land, and until then vested in these annuities to go in the same way.

LORD CHANCELLOR [HARDWICKE]. I am surprised at that precedent, and much doubt of it, wherever Mr. Viner got it; and suppose it was some compromise and by consent. Several instances must have happened between the tenant for life and remainder-man; yet I never heard of such a rule before. I take it, that these dividends go to the person to whom they were due at the time. The trust is to be laid out in land; what kind of land I cannot tell; and must presume it would be land on which these would be the rent-days of payment. Next, to determine so I must determine, whether upon making such a settlement under articles, (the court always directing all usual powers in directing a settlement in pursuance of articles to be made) here would not be a power to make leases. Therefore as I must make presumptions in order to make this analogy between land and money, I must lay the analogy out of the case. The question then is, whether this is to be considered as the interest of money. Where literally so, interest is supposed to grow due from day to day to be sure; and the person entitled to the produce is entitled to it to the last hour of the day: but that is never held that I know of, upon the dividends on South Sea

[1] In *Sherrard* v. *Sherrard*, 3 Atk. 502 (1747), FORTESCUE, M. R., made a like decision in the case of money to be laid out in land, and in the mean time, by order of the court, invested in "Government securities." Cf. *Rashleigh* v. *Master*, 3 Bro. C. C. 99, 101 (1790).

annuities and all annuities of that kind. I do not know what authority there is for it; and this happens so frequently, that it must be known in practice; as to which I will consult the Accountant-General, and consider of it. It would be dangerous to make a precedent contrary to the general practice, which, whatever it is, ought not to be broke in upon.

The next day the Accountant-General said, it was not the practice with them to make a division of the interest; and that this was determined by his Lordship in the *Case of Lord Leicester* in 1744.

Lord Chancellor. I do not remember that case or any other of the same nature. When the money is laid out in land, it is purchased with the dividends perhaps nearly due at that time; tenant for life immediately draws so much out of the dividends, and if afterward he were to do the same he would draw at both ends. But beside, interest on a mortgage becomes due from day to day; mortgagee may call in his money, when he will; and then the interest must be computed up to the day because no particular time is fixed: but by Act of Parliament the dividends on these annuities are made payable on certain days like rent: therefore it is like rent, and distinguishable from interest of money.

HOWELL *v.* HANFORTH.

Common Pleas. 1775.

[*Reported* 2 *W. Bl.* 1016.]

The annuitant, wife to the defendant, being dead, *Adair* moved for leave to take out execution for the proportional arrears of the annuity since the last quarter-day.

Walker showed for cause, that nothing was due since the last quarter-day, either by the condition of the bond, or by any rule of court. Annuities are not subject to apportionment, like rents, by the Statute 11 Geo. 2, *c.* 19, § 15.

But by De Grey, C. J., and the whole court. Though rents and annuities are not in general apportionable by the common law, yet where an annuity is secured by a bond, which becomes forfeited by any non-payment, the annuitant may sue the bond, and levy the penalty, subject to the equitable interposition of the court. In this case the plaintiff did not choose to levy the whole penalty at once, but after judgment, took out several *fieri facias*'s, as arrears became due; the legality of which practice being questioned, the present rule was entered into by consent, about three years ago, that the judgment should stand as a security, with leave to apply to the court to take out process of execution, from time to time, whenever any arrears should accrue. In this situation, the court will guide its discretion by the same rules as if

at first execution had been taken out for the whole penalty. And though rents and common annuities are not apportionable either by law or equity, yet in equity the maintenance of infants is always apportioned up to the day of their deaths, &c., because it would be difficult for them to find credit for necessaries, if the payment depended on their living to the end of the quarter. This case depends on similar principles, the annuity being for a separate maintenance to a *feme covert;* and, as it appears that the quarterly payments were not originally *forward* payments, by way of maintenance for the *ensuing* quarter, (which might make a difference), but payable at the end of each quarter, in order to discharge the expenses incurred in the three *preceding* months, we think it ought to be apportioned, and therefore the

Rule made absolute.

BANNER *v.* LOWE.

CHANCERY. 1806.

[*Reported* 13 *Ves.* 135.]

THIS cause coming on for further directions, a question was made, whether the interest upon a bond debt was to be apportioned. The bond was taken by the testator for £9,000, the consideration for the sale of an estate: the condition reserving the interest to himself and his wife jointly, to be paid by equal half-yearly payments.

Mr. Fonblanque, for the administrator of the testator's widow, a defendant, claimed an apportionment of the interest of the bond, as accruing, *de die in diem.*

Mr. Richards and *Mr. Alexander*, for the residuary legatees, distinguished this from the common case of apportionment by the particular times of payment, specified by the condition; comparing it to the case of money in the funds, and rent not provided for by the Act of Parliament, as not being due *de die in diem.*

THE LORD CHANCELLOR. Upon this subject of apportionment the Legislature was forced to interfere in the instance of rent; and equity has provided for other cases. I shall not consider this as taken out of the general rule upon so nice a distinction. This condition is expressed as in every mortgage and money bond.

The apportionment was therefore directed. Mr. Fonblanque mentioned the case of *Edwards* v. *The Countess of Warwick*, 2 P. Will. 171; see page 176.

WARDEN *v.* ASHBURNER.

CHANCERY. 1848.

[*Reported* 2 *De G. & Sm.* 366.]

THE question in this case was, whether the dividends of East India stock, in which, under the trusts of a settlement dated the 8th of January, 1820, £10,000 was invested, were apportionable between the tenant for life and those who were entitled in remainder under the trusts.

At the hearing of the cause, a reference had been directed to the Master, to inquire as to the nature of the security on which the trust-money was invested.

From the Master's report the following facts appeared: —

The £10,000 had been originally invested in the East India Company's £6 per Cent Remittable Loan, which was secured by promissory notes, and formed part of the territorial debt of the East India Company in India. It was created by the directors in 1822. The dividends, annual payments, or interest, on account of this loan, were paid half-yearly, on the 31st of May and 30th of November in each year.

On the 16th of May, 1834, the company issued a notice, of which the material parts were the following: —

"Instructions have been issued to the Government of Bengal, to commence discharging the £6 per cent remittable debt, by advertising the payments (after fifteen months' notice) of two crores of such debt. Instructions have also been issued to the said Government to open a transfer loan, into which remittable paper, whether previously advertised for discharge or not, may be transferred at the rate of 105 rupees of the new, for 100 rupees of the present loan; the principal so increased to bear interest at £5 per cent per annum, payable in cash in India, or, in the case of residents in Europe, at their option, either in cash in India, or by bills on the court, at twelve months' date, at 2*s.* 1*d.* the sicca rupee; such new loan to be irredeemable for twenty years from the 22d of April, 1834, and when redeemed, to be paid off upon a previous notice of fifteen months, such notice to expire at any time after the termination of the said twenty years."

On the 17th of September following, the Court of Directors issued an advertisement, giving notice that the proprietors of the Bengal £6 per Cent might transfer their property to the New £5 per Cent Transfer Loan, under the conditions specified in the notice of the 16th of May, 1834, until the 1st of December then next, upon which day the lists would be finally closed, and that the property in the new loan would be held in the form of stock; that stock receipts would be granted in Bengal to the respective proprietors or their agents, in exchange for promissory notes transferred; and that the new stock would be transferable at the place of registry, in books to be kept for the purpose, in London and in India.

On the 17th of June, 1835, advertisements were inserted in the Calcutta Gazette, stating the conditions of the new loan, one of which was as follows: —

"It is hereby declared and stipulated, that no part of the Transfer £5 per Cent Loan, opened by the advertisement, shall be paid off before the 22d of April, 1854; and, whenever it shall be redeemed, a previous notice of fifteen months shall be given by public advertisement, which notice may be issued at any time after the 21st of January, 1853. The notice of payment, duly advertised as above, and published in the Government Gazette of Calcutta, shall be considered as equivalent to a tender of payment on the date advertised for discharge, and all interest will cease from that day."

The trustees of the settlement, in pursuance of the regulations and orders contained in the above advertisements and notices, transferred the £10,000, which they had invested in the £6 per Cent Remittable Loan of 1822, into the £5 per Cent Transfer Loan.

The stock receipt which they then took was in the following form:

"*Fort William. Stock Receipt, registered as No.* ——, *of 15th January*, 1835–1836.

"Accountant-General's Office.

"The Governor-General in Council does hereby acknowledge to have received from ———— a sum of £——, as a loan to the East India Company, bearing interest at £5 per cent per annum, payable half-yearly from the 15th of January, 1836.

"Signed, by order of the Governor-General in Council."

Mr. Wigram and *Mr. Lloyd*, for the plaintiff, who was one of the persons entitled in remainder, referred to a note which had been sent from the Accountant's Office at the India-house, certifying that a creditor had not power to call in his capital.

Mr. Russell and *Mr. Haldane*, for the tenant for life.

Mr. A. J. Lewis, appeared for another party.

Mr. Glasse appeared for the trustees.

The Vice-Chancellor [Sir J. L. Knight-Bruce] considered the effect of the evidence to be, that the debt was redeemable at the option of the company, but was one of which the holder could not demand payment; and, as the settlement was not within the operation of the Apportionment Act, he was of opinion that the income from the last half-yearly payment to the death of Sir Lionel Smith, the tenant for life, namely, from the 15th of July, 1841, to the 2d of January, 1842, was not part of his personal estate. The half-yearly payment not being apportionable, he must declare that the whole of it belonged to the persons entitled in remainder.

The costs of all parties were ordered to be paid out of the fund.

WRIGHT *v.* TUCKETT.

CHANCERY. 1860.

[*Reported* 1 *J. & H.* 266.]

TEN shares in the Leeds and Liverpool Canal were held upon trust for Richard Wright for life, and after his death for his lawful issue.

Richard Wright died on the 18th of September, 1859.

The trustees, by their answer, stated that a dividend on each of the shares was declared at a meeting held on the 16th of September, 1859, and made payable on the 1st of November, 1859. The accounts of the company were made up to the 30th of June and the 31st of December; but, so far as they were informed, the dividend was not expressly declared in respect of profits made up to any particular time. Under these circumstances, a question was raised, who was entitled to this dividend.

Sir Hugh Cairns, Q. C., and *Mr. H. Stevens*, for plaintiffs, the children of Richard Wright.

Mr. Surrage for defendant's grandchildren.

Mr. O. Morgan for a mortgagee.

Mr. Giffard, Q. C., and *Mr. Fry*, for the trustees, mentioned *Clive* v. *Clive*, Kay, 600.

THE VICE-CHANCELLOR [SIR WILLIAM PAGE WOOD] observed that *Clive* v. *Clive* turned upon the peculiar wording of the 147th clause of the deed of settlement in that case, and directed the dividend to be paid to the representative of the tenant for life.[1]

[1] BATES *v.* MACKINLEY.

CHANCERY. 1862.

[*Reported* 31 *Beav.* 280.]

THE question in this case was whether certain sums received since a testator's death by his executors were to be considered as income or capital.

By his will, dated the 23d of January, 1860, the testator, William Bates, bequeathed his personal estate to his wife, Emily Mary Bates, and Edward Mackinley, upon trust, at their discretion, to "retain, in their actual state of investment, all shares in public companies in *Great Britain* or *abroad*," and to convert and invest the rest; and "out of the annual income," to pay his wife £1,000 a year for life. Subject thereto he gave such residue to his six daughters for life, and afterwards to their children.

On the 12th of February, 1860, the testator died. The income of his personal estate was (exclusive of the dividends on the shares after mentioned) insufficient to pay the £1,000 a year to his widow.

It appeared that, in 1853, the testator and other persons had obtained a grant from the Government of Peru of the privilege for lighting the city of Lima with gas, and a joint stock company was formed. The testator became entitled to a number of original and preferential shares in the company, which passed, on his death, to his executors.

The deed of settlement of the Lima Gas Company was dated the 26th of March, 1853, and the clauses relating to the present question were as follows: —

"12. That the profits of the company, after satisfying all costs, charges and expenses

WIGGIN *v.* SWETT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1843.

[*Reported* 6 *Met.* 194.]

APPEAL[1] from a decree of the Judge of Probate for the County of Suffolk, allowing an account rendered by the appellee, as surviving husband of the executrix of the will of William Thurston. The appellant was the administrator *de bonis non*, with the will annexed, of the estate of said Thurston. The case was submitted to the court on an agreed statement, from which it appeared that William Thurston died August 25, 1822, leaving a will, by which he made his widow Elizabeth executrix, gave her a house for her life, and also gave her $800 a year "during the full term of her natural life, to be paid to her quarter-yearly," and he charged all his real and personal estate with the payment of this annuity.

of the company, and the interest of all moneys for the time being owing" [including certain specified payments] "shall be divided, by way of equal dividend, amongst all the shareholders who may have paid calls in respect of their shares in the capital as hereinafter mentioned;" and then in making certain payments to Mr. Charon, and after such last-mentioned payments, "then the profits of the company shall be thenceforth applied, by way of equal dividends on the shares in the capital of the company."

"27. That all payments required to be made by the company shall be made on the order of the committee of management, but not otherwise."

"29. That the committee of management shall cause proper books of account to be kept, and entries made therein of all such matters and things as are usually kept in books of accounts of a similar nature, and shall on the 21st day of December and the 30th day of June, in each year, cause true and accurate balance sheets to be made up of the stock and effects of the company, and of the debts owing by it, and of the profit and loss which shall have ensued on the transactions of the company for the preceding half year."

"31. That as soon as possible after every half-yearly balance sheet shall have been made up, the committee of management shall pay or divide the profits which may appear to have been made during the preceding half year, to the person or persons entitled thereto under or by virtue of these presents."

The bill contained the following statements, which were verified by the affidavit of the two executors: —

On the formation of the company, it was stipulated that the English shareholders should participate in a certain *bonus* or sum of 100,000 dollars and interest thereon, in exclusion of the Lima shareholders in the company; but, in the lifetime of the testator, a negotiation took place between the English and Lima shareholders, for an arrangement, that the English shareholders should relinquish their claim to the exclusive participation in the sum of 100,000 dollars, in favor of the company, and should receive, in lieu thereof, the sum of forty dollars per share. This arrangement had been duly completed by deed since the death of the testator.

In February, 1861, a sum of £344 6*s.*, and recently a sum of £1,055 1*s.* 4*d.* had been received by the testator's executors from the company, in payment of dividends

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[1] Only the question as to apportionment is here given, and a short statement is substituted for that in the report.

The widow subsequently married the appellee, and after her death, which occurred on August 22, 1840, he rendered the account in question. In this account a charge was made and allowed for the annuity at the rate of $200 a quarter up to the day of the annuitant's decease, which was three days before a quarterly payment fell due.

The appellant claimed the right to charge back the sum which was allowed on account of the annuity after May 25, 1840.

Bartlett, for the appellant.

Metcalf, for the appellee.

SHAW, C. J. . . . The most material question, submitted on this appeal, arises upon the apportionment of the annuity. The appellee claims to charge the account with part of an instalment, proportioned to the time which elapsed between the next preceding day of payment and the day of the decease of the annuitant.

The general rule, both of law and equity, is, and is admitted by the appellee's counsel to be, that where an annuity is payable on fixed days during life, and the annuitant dies before the day, the personal representative is not entitled to a proportionable part of the annuity.

on the testator's original shares. Such dividends were declared and made and paid after the death of the testator, in respect of profits made by the company prior to the 30th day of November, 1859, and which were ascertained or estimated by a balance sheet made out and dated on such last-mentioned day. A doubt had arisen whether such dividends ought to be considered capital or income of the testator's estate.

A further sum of £649 5*s.* has been received by the executors of the testator since his death, being a payment made by the company in respect of the testator's share of the compensation, at the rate of forty dollars per share, for relinquishing his claim on the bonus of 100,000 dollars. A doubt had also arisen whether this sum ought to be treated as capital or income of the testator's estate.

Mr. Selwyn and *Mr. Kay*, for the plaintiffs.

Mr. E. G. White, for Edmund Mackinley, the executor.

Mr. Lloyd and *Mr. H. Stevens*, for the grandchildren of the testator.

THE MASTER OF THE ROLLS. [SIR JOHN ROMILLY.] No person is entitled to any portion of the profits made by a public company, until a dividend has been declared, which declaration of a dividend means a resolution passed by the body having the management of the company, that a dividend should be paid at a certain time. Here, no doubt, the profits had been earned at an earlier period, but that does not entitle the shareholder to a definite share of the profits. If it had become necessary for the company to erect additional works, some of these profits would have been applied for that purpose.

The analogy of the decision in *Clive* v. *Clive*, Kay, 600, of a specific legacy of bank stock, where the testator died a few days before the time of payment of a dividend, is perfect. The profits had been made before, but no part of them had been appropriated or belonged to the testator's estate. The shareholder could bring no action against the company until after the dividend had been declared. It is therefore impossible to doubt, but that the dividends declared after the testator's death are a portion of the income of the legatees for life.

It must therefore be declared, that the sums received in respect of *bonus*, exclusive of interest, since the testator's death formed *corpus*, and that all sums received in respect of dividends on shares declared since the testator's death formed part of the income of his estate.

Cf. *Burroughs* v. *N. C. R. R. Co.*, 67 N. C. 376 (1872).

1 Roper on Leg. (1st Amer. ed.) 589. The same rule prevails in regard to rents and other payments at particular days. *Jenner* v. *Morgan*, 1 P. W. 392; *Hay* v. *Palmer*, 2 P. W. 501; *Tracy* v. *Strong*, 2 Connect. 659, 664. By the will, the annuity given to the executrix was $800 a year, payable quarterly; which was in effect giving her $200 to be paid once each quarter. As the testator died August 25th, 1822, the annuity became payable on the 25th of November, February, May, and August. *Houghton* v. *Franklin*, 1 Sim. & Stu. 390. As Mrs. Swett died August 22d, 1840, that proportion of the annuity which is supposed to have accrued from May 25th to August 22d, and which would have been payable, had she lived till the 25th of August, cannot be allowed. It falls within the general rule already stated, and not within the exceptions to that rule which were made in the cases cited for the appellee.[1]

JOHNSON *v.* BRIDGEWATER MANUFACTURING COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1859.

[*Reported* 14 *Gray*, 274.]

ACTION OF CONTRACT by the executor of the will of Mary Johnson, to recover a dividend on twelve shares in the defendants' capital stock, part of the estate of her husband, Seth Johnson, who died in July, 1826, and whose will was duly admitted to probate, and contained these clauses: —

"*First.* I do give and bequeath unto my wife Mary the use and improvement of all my estate, both real and personal, so long as she shall remain unmarried, to manage the same and dispose of the interest and income thereof for her own support, and for the education, support and maintenance of my children, in such manner and in such proportions as she may think they most need."

"*Secondly.* I give and devise unto all my children, their heirs and assigns, all my estate, both real and personal, after the decease or marriage of my said wife, equally to be divided between them and those who represent them."

The widow was appointed executrix, and as such received during her lifetime all the income of his estate. In 1831 she transferred the shares as collateral security for money borrowed for the use of herself and her children, upon payment of which they were retransferred and new certificates given to her in the name of the "Estate of Seth Johnson." She never married again, and died on the 12th of June, 1856. On the 23d of June the corporation declared a dividend on these shares for the year which ended on the 31st of May, 1856.

[1] See *Reed* v. *Cruikshank*, 46 Hun, 219 (1887).

The plaintiff, as executor of her will, demanded of the defendants, and was refused, payment of this dividend, before commencing this action. Upon the death of Mrs. Johnson, an administrator *de bonis non* with the will annexed of the estate of Seth Johnson was appointed, and claimed and demanded said dividend of the defendants.

The parties submitted to the decision of the court the case above stated.

S. D. Parker, for the plaintiff.

J. P. Healy, for the defendants.

Merrick, J. By the will of her husband, Seth Johnson, the plaintiff's testatrix became entitled to the use and improvement, so long as she should remain unmarried, of all the shares of the capital stock of the defendant corporation owned by him at the time of his death. By this bequest she became the owner of the income arising and derivable from the shares; and upon the dividend being made from year to year, the amount of each successive dividend belonged to her, and was so much money received by the corporation to her use. She could therefore, after demand, maintain an action against the corporation in her own name for its recovery. The shares remained in her hands as executrix of her husband's will, to be divided according to its provisions among his children at her marriage or decease; but the income up to the time of the occurrence of one of these events belonged exclusively to her. *Ellis* v. *Essex Merrimack Bridge*, 2 Pick. 248. It is immaterial that the dividend sued for in this action was not declared until after her death; because it was for gain and profit earned and acquired during the year preceding the 31st day of May next before her death. It was income therefore which belonged to her, although preparation for its payment was not made until after her decease. And for its recovery an action may be maintained by her executors against the defendants as for so much money had by them to her use. They must therefore be defaulted and

Judgment entered for the plaintiff.

BLIGHT *v.* BLIGHT.

Supreme Court of Pennsylvania. 1866.

[*Reported* 51 *Pa.* 420.]

Error to the District Court of Philadelphia. In that court it was an amicable action between George Blight, executor, &c., of Maria Blight, deceased, plaintiff, and James H. Blight, executor and trustee, &c., of George Blight, deceased, in which the following case was stated: —

George Blight, the elder, by will, dated 31st day of August,

1834, duly probated, and considered as part of this case, *inter alia*, bequeathed as follows: —

"I give and bequeath to her, the said Maria Blight (the plaintiff's testatrix), the annuity or yearly sum of $6,000, to be paid to her in even and equal quarterly payments, for and during all the term of her natural life.

"These bequests to my said dear wife are to be taken and considered to be in lieu and full satisfaction of all dower in my estate."

The said George Blight died on the 1st day of September, 1834, and the defendant is the surviving executor of his will. He entered on the performance of the trust, and paid to the said Maria Blight during her life, her said annuity as it fell due on the first days of December, March, June, and September, in quarterly payments, as aforesaid. The last payment was made on 1st of December, 1864. The said Maria Blight died on the 11th day of January, 1865.

If the court be of opinion on the above facts that the law is with the plaintiff, and that the said annuity is apportionable, then judgment to be entered for plaintiff for $638.33 with costs; but if they are of opinion that the said annuity is not apportionable, and that the law is with the defendant, then judgment to be entered for defendant, with costs. Either party to take a writ of error.

1865, *July* 15. — Judgment for plaintiff, no opinion being given.

Ed. Waln, for plaintiff in error.

John G. Johnson, for defendant in error.

The opinion of the court was delivered, January 20th, 1866, by Woodward, C. J. The annuity in this case was to a surviving widow, "in lieu and full satisfaction of all dower," and was payable quarterly. She died in the midst of a quarter, and the question is, whether the annuity is apportionable.

The authorities so fully cited by the learned counsel of the plaintiff in error, prove the general rule of law to be that apportionment is not to be made of rents, dividends, annuities and other periodical payments becoming due at fixed intervals, but only of sums accruing *de die in diem*. But the same authorities establish an exception to the general rule in favor of dower and sums for the maintenance of a wife or child: Hill on Trustees, 385; *Gheen* v. *Osborne*, 17 S. & R. 171. And this case falls within the exception, and not the rule. The annuity was in lieu of dower, and lasted as long as dower would have lasted, and dower runs to the last day of life. It is of no consequence that the widow was rich and could live without the annuity. Neither the rule nor its exception can be administered with a view to such circumstances. She was as well entitled to receive the equivalent for dower to the day of her death as if she had been dependent on it for her daily bread.

The judgment is affirmed.[1]

[1] See *Lackawanna Co.'s Case*, 37 N. J. Eq. 26 (1883). Cf. *Tracy* v. *Strong*, 2 Conn. 659 (1818).

WILSON'S APPEAL.

SUPREME COURT OF PENNSYLVANIA. 1885.

[*Reported* 108 *Pa.* 344.]

JANUARY 15th, 1885. Before MERCUR, C. J., GORDON, PAXSON, TRUNKEY, STERRETT and GREEN, JJ. CLARK, J., absent.

Appeal from the Orphans' Court of Philadelphia County: of January Term, 1884, No. 303.

Appeal of Ellwood Wilson, Jr., and Emily V. Wilson, his wife, in right of said wife, from a decree of said court sustaining exceptions filed on behalf of the executrix of Lewis A. Truefitt, deceased, to the adjudication of the account of the Phila. Trust Safe Deposit & Insurance Co. substituted trustees, under the will of Frances V. Truefitt.

Frances V. Truefitt died, testate, leaving a husband, Lewis A. Truefitt, and an adopted daughter, Emily V. Truefitt, subsequently intermarried with Ellwood Wilson, Jr. By her will, the testatrix bequeathed the residue of her estate to trustees, in trust to pay one half the net income to her husband for life, and to apply the remaining half, and after the death of her husband, the whole of said income, to the maintenance and education of her adopted daughter, until the arrival of the latter at the age of twenty-one years, and thereafter to pay over the said income to said adopted daughter for life — with remainder to her children.

Lewis A. Truefitt died December 27th, 1882, and the question which arose at the audit was whether the semi-annual interest which was due April 1st, 1883, on certain bonds of the city of Pittsburgh, and certain other bonds of the Reading Coal & Iron Company, and which were part of the residuary estate, should be paid in full to Emily V. Wilson, or divided between her and the executrix of Lewis A. Truefitt.

The auditing judge held that this interest on said bonds was not apportionable and awarded it all to Mrs. Wilson; but upon exceptions filed to this adjudication the court in banc decided that said interest was apportionable, and entered a decree dividing it between Mrs. Wilson and the executrix of Mr. Truefitt; whereupon Ellwood Wilson, Jr., and Emily V. his wife, in the right of the latter, took this appeal, assigning for error the decree of the court.

A. Sydney Biddle (with whom was *Ward*), for appellant.

Byerly Hart for appellee.

MR. JUSTICE PAXSON delivered the opinion of the court, February 23d, 1885.

The single question presented by this record is, whether the interest upon municipal and other corporation bonds can be apportioned. The auditing judge, following a decision of the late Judge King, in *Earp's Will*, 1 Parsons, Select Equity Cases, 453, held that they could not

be apportioned. Upon exceptions filed the Orphans' Court reversed the decree of the auditing judge and apportioned the income. The bonds about which the contention arose, were bonds of the city of Pittsburgh, and the mortgage bonds of the Philadelphia & Reading Coal & Iron Company.

The rule at common law was that the interest on money loans was apportionable, and in this respect it differed from other periodical payments like dividends, rent, pensions and annuities. The reason for the distinction is that in the case of money at interest, the interest accrues *de die in diem*, which cannot be said of some at least of the other payments mentioned.

That this rule is inequitable, and to some extent arbitrary, may be assumed from the fact that modern legislation and judicial decision have steadily tended to narrow the rule and enlarge the exceptions. Thus, courts of equity have extended the doctrine of apportionments to cases of settlements or annuities for maintenance, upon the ground of the presumed intention of the settlor or donor to provide for the support of the beneficiary down to the determination of the gift by death, marriage, or arrival at majority as the case may be: *Gheen* v. *Osborn*, 17 S. & R. 171; *Blight* v. *Blight*, 1 P. F. S. 420.

In this State the rigor of the common law has been relaxed in favor of the tenant for life so far as regards rents, by the Act of February 24th, 1834, and in England, by Statute 34 and 35 Victoria, it is declared that "All rents, annuities, dividends, and other periodical payments in the nature of income, shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

The Orphans' Court, while not a court of equity, administers the law upon equitable principles, and is not bound to enforce a common law rule admittedly obnoxious to equity further than it is constrained by authority, and the reason upon which the rule itself rests.

There seems to be a reason why dividends declared by stock companies should not be apportioned. Such dividends are not interest accruing from day to day, but profits upon business operations which in a strict sense cannot be said to accrue at all, but are declared at the pleasure of a board of managers, with nothing to show during what portion of the year they were earned. So, too, of annuities. In such cases, there is no earning of interest upon anything; they are fixed sums payable at stated days, and until those days arrive, there is nothing earned and there is nothing due.

The principle has long been settled in England that income derived from the public funds is not apportionable. It was so ruled in *Pearly* v. *Smith*, 3 Atkyns, 260, in the case of the South Sea annuities: and in *Sherrard* v. *Sherrard*, Id. 502. These cases were followed by many others affirming the same doctrine. It is needless to cite them as there is no dispute about the English rule. In *Earp's Will*, Judge King adopts the English rule and applies it to municipal and corporation

bonds. We do not know to what extent Judge King's decision has been followed by other Orphans' Court and Common Pleas judges throughout the State, but as presented here it is a new question. We have no decisions of our own, therefore, to embarrass us. The decision of so eminent a jurist as Judge King is entitled to much respect, but it is not authority beyond its reason.

We have not the case of United States and State loans before us, and no question in regard to them will be decided, and they will be considered only so far as they are necessarily involved in the discussion of municipal and other corporation bonds. I am unable to see any distinction between them upon principle; if any is made it must be an arbitrary one, and because some rule of policy requires it.

It is manifest from a careful study of Judge King's opinion that he did not consider, and probably entirely overlooked the peculiar character of the English consols, and their marked difference from the public debt of this country. In many of the English cases the question arose upon annuities, such as the South Sea annuities. The English consols are but annuities; the interest only is paid, the principal is never reimbursable, and the Government can only redeem them by buying them in the market.

The reasoning of the English cases goes upon the ground that the interest does not accrue day by day, which is entirely true of their consols. In *Pearly* v. *Smith*, *supra*, Lord Hardwicke stated it as tersely as it can be put, when he says: "If the security had continued a mortgage, the claimant would have been entitled to the demand he now makes, because there interest accrued every day for forbearance of the principal, though notwithstanding it is usual in mortgages to make it payable yearly." The same distinction between mortgages and funded debt is recognized in *Sherrard* v. *Sherrard*, *supra*, and many other English cases. And it is an obvious distinction as applied to South Sea annuities, and British consols generally. But the distinction between a mortgage and bonds of the city of Pittsburgh, and the bonds of the Philadelphia & Reading Coal & Iron Company, secured by a mortgage, is difficult to see. In either case it is a loan, and the interest accrues from day to day as the consideration of the forbearance. That the principal is not due is not to the point, for money is loaned for a term of years upon mortgages as well as city or corporation bonds.

No reason other than the one just stated has or can be given why the income from municipal bonds may not be apportioned. The learned court below, however, attempted to take municipal bonds out of the English rule in regard to Government securities, by showing that municipal and other corporations may be compelled to pay, which is not the case with either the National or State Government. The conclusion is correct, but we do not assent to the reasoning. It is true the Government is sovereign; it cannot be sued and compelled to pay like an ordinary debtor, while municipalities, which are the creatures of the State, may be so compelled. This however is outside of the question. If the

sovereign does not pay there is nothing to apportion. No question of apportionment can be raised until there is actual payment of the interest, and when payment is made the question whether it was a voluntary or a forced payment has no bearing upon the principle of apportionment.

Nor is there any question about government policy or treasury convenience. This was clearly shown by Judge King in *Earp's Will*, *supra*, where he said: "It is a mistake to suppose that the rule in equity had any original connection with government policy or treasury convenience. From the time of its establishment by Lord Hardwicke in 1744, such an idea is not intimated in any decided case. And this for the simple reason that the treasury had no interest in the subject." Judge King then proceeds to give what he conceived to be the reason of the rule in equity. It was substantially that the funded debt carries with it the idea of permanency, and becomes a favorite investment with persons desirous of having a fixed income; that the interest of such investments may be applicable to a series of persons for a long time. These may be very good reasons to induce persons who desire permanent investments to buy such securities, and perhaps why the income of English consols and South Sea annuities should not be apportioned, as the interest thereon does not accrue from day to day. But the interest on these municipal and corporation bonds does accrue *de die in diem* precisely as in the case of an ordinary bond and mortgage, and we are wholly unable to distinguish one from the other in principle. The applicability of this rule to Federal and State securities will be decided when the cases arise; they have been referred to here only for the purpose of illustration, and in so far as such allusion was necessary to a proper discussion and understanding of the case before us.

The decree is affirmed and the appeal dismissed at the costs of the appellant.[1]

[1] RE ROGERS' TRUSTS.

CHANCERY. 1860.

[*Reported* 1 *Dr. & Sm.* 338.]

THIS petition was presented by the trustees of the will of William Rogers, deceased, under the thirtieth section of the "Law of Property and Trustees' Relief Amendment Act" (22 & 33 Vict. *c.* 35), for the advice of the court as to whether certain dividends received by them on railway debentures after the death of their testator, but which accrued partly during the lifetime of the testator and partly after his death, though not payable till after his death, should be treated as forming part of the income or capital of their testator's estate.

William Rogers died on the 11th of February, 1859, having by his will, dated the 17th of June, 1857, given all his real and personal estate not specifically disposed of to his trustees, the petitioners, upon certain trusts expressed in his will.

The testator, at the time of his death, was possessed of £3,000, secured by three debentures of the Great Western Railway Company, for £1,000 each, and bearing interest after the rate of £5 per cent, and of £3,000 secured by three debentures of the Midland Railway Company for £1,000 each, and bearing interest after the rate of £4 5*s.* per cent.

Each of the debentures of the Great Western Railway Company purported to be an

C. *Goods conveyed in Fraud of Creditors.*

OSBORNE *v.* MOSS.

SUPREME COURT OF NEW YORK. 1810.

[*Reported* 7 *Johns.* 161.]

THIS was an action of trespass *quare clausum fregit*, &c. The declaration stated, 1. That on the 10th of September, 1809, the defendant, at Moreau, in Saratoga County, broke and entered the close of the plaintiff, and took and carried away one pair of oxen, of the value of 200 dollars, and two cows, of the value of 100 dollars. 2. For taking and carrying away the same chattels. The defendant pleaded

assignment of the undertaking of the Great Western Railway, and of all the tolls arising therefrom under their Act, unto William Rogers, his executors, administrators and assigns, until the sum of £1,000, with interest for the same at the rate of £5 per cent, should be satisfied, with a proviso that the principal sum should be repaid at the end of three years from the 30th of May, 1857. The principal, therefore, on them was not payable till May, 1860. To each of these debentures were attached warrants or coupons for the payment of interest half-yearly, on the 2d of January and 2d of July in every year.

On the 2d of July, 1859, the sum of £73 8*s.* 9*d.* became due for the half-year's interest on the debentures, and was received by the petitioners.

Each of the debentures of the Midland Railway also purported to be an assignment of the undertaking to William Rogers, till the sum of £1,000 and interest, after the rate of £4 5*s.* had been satisfied, and contained a stipulation that the principal sum of £1,000 should be repayable on the 7th of January, 1860, and that in the mean time the company should, in respect of the interest on the principal sum, pay to the bearer of the said coupons or interest warrants respectively the several sums therein specified. To each of these debentures coupons were also annexed for payment of the interest half-yearly, on the 1st of January and the 1st of July in every year.

On the 1st of July, 1859, the sum of £62 8*s.* 6*d.* became due for a half-year's interest on the debentures, and was received by the petitioners.

Questions having arisen between the tenants for life and remaindermen under the testator's will, as to whether these sums of £73 8*s.* 9*d.* and £62 8*s.* 6*d.* were income or were apportionable, the petitioners presented the present petition for the advice of the court.

Mr. Whitcombe, for the trustees.

Mr. Shapter and *Mr. Eddis*, for the remaindermen.

Mr. Glasse and *Mr. Fry*, for the tenants for life.

THE VICE-CHANCELLOR. [SIR R. T. KINDERSLEY.] This is a question which has nothing to do with the Apportionment Act (4 & 5 Will. 4, *c.* 22), and would equally have arisen if that Act had never passed.

The object of the Apportionment Act was to apportion as between different persons one whole and entire thing; a half-year's dividend on so much stock is one entire thing, and that Act would apply to it.

In the present case, the interest payable on the debentures, though payable half-yearly, is not an entirety, but is an accumulation of each day's interest, which accrues *de die in diem*; and which, though not presently payable, is still due. The only ques-

as to the force, &c., Not guilty; and as to the residue, that before, &c., to wit, on the 11th September, 1809, the defendant was legally appointed administrator of Samuel Hodges, deceased; that the intestate was possessed, as of his own proper goods, of the said chattels,

tion in my mind was, whether the practice in chambers was otherwise than to apportion such interest; but on inquiry at chambers I find that it is a matter of course to treat so much of the half-year's interest as has accrued during the life of the testator as capital.

The present is not indeed the case of a common bond, but of debentures issued under an Act of Parliament. The debenture is in the nature of a mortgage, to secure a certain sum of money, with interest; and there are coupons attached to the debenture, which make the interest payable half-yearly. It appears to me to stand in the same position as a mortgage; and therefore that so much of the first half-year's interest payable after the testator's death as accrued due during his lifetime, must be apportioned and treated as capital.

DEXTER *v.* PHILLIPS.

SUPREME JUDICIAL COURT OF MASSCHUSETTS. 1876.

[*Reported* 121 *Mass.* 178.]

BILL IN EQUITY, filed June 26, 1874, by the trustees under the will of William Phillips, alleging that the testator died April 8, 1873, and that by his will the residue of his estate was given to the plaintiffs in trust to pay the net income thereof, as often as semi-annually, to John C. Phillips, during his natural life, and upon his decease, if he should leave issue surviving him, to pay over, transfer and convey the principal or capital of the trust fund to and among his lawful issue; but if no lawful issue of John C. should be living at his decease, then to pay over the net income of the trust fund, as often as semi-annually, unto John Phillips, son of Thomas W. Phillips, during his natural life, and at his decease to pay over, transfer and convey the principal or capital unto the lawful issue of John Phillips; that John C. Phillips is living, unmarried, without issue; that John, son of Thomas, is living, married, and has four minor children; that on April 8, 1873, when the testator died, different portions of his real estate were occupied by tenants, some at will and some under leases, who paid rent by the quarter or month, and that the quarters or months had commenced, but were not terminated, on April 8, 1873, and that the amount of rents which were accruing and had not then become payable was $8,448.78; that by the terms of the leases rent was payable for each quarter or month during its term, and at that rate for fractions of a quarter or month, and that the lessor had the right under each lease to terminate it, in case of the destruction of the buildings on the leased premises by fire or any other unavoidable casualty, or if they were injured by such causes so as to be unfit for habitation; and that the leases also contained the usual clause of entry and forfeiture in case of a breach of the conditions of the lease; that on April 8, 1873, portions of the testator's personal property were invested in bonds and notes, and the interest on them was accruing and had not become payable, and that the amount of such interest was $25,925.65, and that some of these were bonds of the United States, issued under different Statutes thereof; that the executor under said will collected said rents and interest at about the times the same respectively became payable, and paid the same over to the trustees under said will; that the plaintiffs held the same, and were in doubt whether said sums, or either of them, or any part thereof, after deducting proper commissions, should be paid over to said John C. Phillips, or added to the capital, and asked the instruction of the court thereon, and that the defendants might interplead and set forth their respective interests in said sums; and for further relief.

The answers admitted all the allegations of the bill; John C. Phillips contending that the said several sums, as to which instructions were asked, after the deduction of

and that the defendant, as administrator, entered and took the chattels, and this he is ready to verify, &c.

The plaintiff replied, that before, &c., to wit, on the 7th of August, 1809, in the life of the intestate, at a justice's court, held, &c., he, the

all proper commissions, belonged to him as income; and John Phillips, as well as Richard Olney, who had been appointed by the court guardian *ad litem* of the infant defendants, and next friend of all persons, not ascertained or not in being, who might be interested in said sums of money, or either of them, contending that said sums should be added to the capital of the fund.

Hearing on the bill and answers, before *Endicott*, J., who reserved the case for the consideration of the full court.

C. A. Welch, for John C. Phillips.

F. C. Welch, for John Phillips.

R. Olney, for the other defendants.

GRAY, C. J. It is a general rule of the common law, followed in chancery, that sums of money, payable periodically at fixed times, are not apportionable during the intervening periods.

It is accordingly well settled, both at law and in equity, except when otherwise provided by Statute, that a contract for the payment of rent at the end of each quarter or month is not apportionable in respect of time. *Sohier* v. *Eldredge*, 103 Mass. 345. *Clun's Case*, 10 Rep. 127 a, 128 a. *Jenner* v. *Morgan*, 1 P. Wms. 392. *In re Markby*, 4 Myl. & Cr. 484. *Browne* v. *Amyot*, 3 Hare, 173. *Beer* v. *Beer*, 12 C. B. 60. *In re Clulow*, 3 Kay & Johns. 689. The opposing decision on this point in *Foote, appellant*, 22 Pick. 299, appears to have been made without much consideration or reference to authorities, and is in effect overruled by *Sohier* v. *Eldredge*, *ubi supra*.

So dividends on shares in corporations or joint stock companies are not apportionable, unless expressly so directed by Statute, or by the instrument under which the question arises. *Foote, Appellant*, 22 Pick. 299. *Granger* v. *Bassett*, 98 Mass. 462. *Clive* v. *Clive*, Kay, 600. *In re Maxwell's Trusts*, 1 Hem. & Mil. 610. Although the uncertainty whether the dividend will be declared on a particular day, and the impracticability of ascertaining how much of it has been earned at any earlier time, have been mentioned in some of the cases as reasons for this conclusion, they are not the principal grounds on which it rests; for the rule has been held equally applicable to cases where there was no such contingency.

Thus annuities, except where clearly intended for the daily support of the beneficiary, as in the case of a child or of the separate maintenance of a wife, are within the rule. *Wiggin* v. *Swett*, 6 Met. 194. *Hay* v. *Palmer*, 2 P. Wms. 501. *Reynish* v. *Martin*, 3 Atk. 330, 336. *Howell* v. *Hanforth*, 2 W. Bl. 1016. *Anderson* v. *Dwyer*, 1 Sch. & Lef. 301. *Franks* v. *Noble*, 12 Ves. 484. *The Queen* v. *Treasury Commissioners*, 16 Q. B. 357. *Leathley* v. *Trench*, 8 Irish Ch. 401.

The rule has always been held in England to apply to investments in the public funds. It was applied by Lord Hardwicke to the South Sea Annuities, even where the debt, by the terms of the settlement, had originally been secured upon a mortgage, the interest upon which would have been apportionable, and had been transferred to Government securities by order of the court; or where the money was directed to be laid out in land, and in the mean time to be invested in Government securities, the interest and dividends to go in the same way that the rents and profits would, and the rents, if it had been actually invested in land, would have been apportionable under St. 11 Geo. II. c. 19, § 15. *Pearly* v. *Smith*, 3 Atk. 260. *Sherrard* v. *Sherrard*, 3 Atk. 502. *Wilson* v. *Harman*, 2 Ves. Sen. 672; s. c. Ambl. 279. And it has been uniformly applied to the three per cent bank annuities or consols. *Rashleigh* v. *Master*, 3 Bro. Ch. 99. *Michell* v. *Michell*, 4 Beav. 549. *Campbell* v. *Campbell*, 7 Beav. 482. *In re Longworth's Estate*, 1 Kay & Johns. 1. *O'Brien* v. *Fitzgerald*, 1 Irish Ch. 290. In each of those cases, the interest of the holder was a perpetual annuity, at a fixed rate of interest, subject to redemption by the Government by payment of the principal sum

plaintiff, by the judgment of the court, recovered against the intestate 20 dollars and 3 cents, and that, on the 8th of August, in the life of the intestate, he obtained execution upon the said judgment, and delivered it to a constable, who levied on the said chattels, in the lifetime of

upon which the interest was computed. St. 6 Geo. II. *c.* 28. *Trafford* v. *Boehm*, 3 Atk. 440, 444. *Kirby* v. *Potter*, 4 Ves. 748, 751. *Wildman* v. *Wildman*, 9 Ves. 174, 177.

So the half-yearly interest on a share in a loan of the East India Company, redeemable after a certain period at the option of the company, but of which the holder could not demand payment, was held by Vice-Chancellor Knight-Bruce not to be apportionable between tenant for life and remainderman ; although it had been taken as a substitute for a debt of the company, secured by its promissory note bearing interest ; and although the stock certificate described the new loan as a debt, and, under the condition for redemption, the last payment might have to be for an apportioned part of the half-yearly interest. *Warden* v. *Ashburner*, 2 De G. & Sm. 366.

The same rule was applied by this court in *Sargent* v. *Sargent*, 103 Mass. 297, to coupons for interest on bonds of the United States; and upon reconsideration of the question, with the aid of the able argument for the remaindermen in the present case, we see no reason to doubt the correctness of that decision.

It is contended by the learned counsel that the interest on such bonds falls within the rule that interest on money is apportionable, though payable half-yearly or at other stated times.

That is doubtless the rule with regard to interest upon a debt, the principal of which is already due and payable, and in an action upon which the creditor might recover interest for the detention of his money if no days of payment of interest had been fixed ; and even if the debt is secured by bond or mortgage. *Foote, Appellant*, 22 Pick. 299. *Edwards* v. *Warwick*, 2 P. Wms. 171, 176 ; s. c. 1 Bro. P. C. (2d ed.) 207. *Banner* v. *Lowe*, 13 Ves. 135. The reason for this was stated by Lord Hardwicke, in the cases already cited, to be "because there interest accrues every day for forbearance of the principal," and the "mortgagee may call in his money when he will." 3 Atk. 261. 2 Ves. Sen. 673.

The reason assigned in *Foote, Appellant*, 22 Pick. 299, 305, that "the acquisition is uniform and certain, and capable of an exact apportionment for any definite periods of time, whether great or small," cannot be relied on ; for the same reason would be equally applicable, and, as we have seen, was in that case erroneously applied to rents.

The cases, cited for the remaindermen, of *Johnston* v. *Moore*, 27 L. J. Ch. 453, and *Ibbotson* v. *Elam*, L. R. 1 Eq. 188, depended upon the terms of partnership agreements to pay interest upon the amount of capital contributed by each partner.

Only two other cases have been cited, in which the interest was apportioned, when the principal debt was not already due and payable.

The one is *Sweigart* v. *Frey*, 8 S. & R. 299, in which land, devised to a widow for life, with directions to executors to sell it at her death and divide the proceeds of sale equally among the testator's children, was sold by agreement of all parties in her lifetime, and the purchaser expressly agreed to pay the purchase money to the heirs at her death and to pay interest thereon annually to her during her life. The decision, in favor of the apportionment of the interest during the year in which she died, rests either on the express agreement of the parties, or on a somewhat doubtful analogy to the cases, already mentioned, of provisions for the support of children or for the separate maintenance of a wife. See *Wiggin* v. *Swett*, 6 Met. 194, and other cases above cited. *Green* v. *Osborn*, 17 S. & R. 171. *Tracy* v. *Strong*, 2 Conn. 659. *Manning* v. *Randolph*, 1 Southard, 144.

The other is *In re Rogers's Trusts*, 1 Dr. & Sm. 338, in which Vice-Chancellor Kindersley held that bonds or debentures issued by a railway company under authority of an Act of Parliament, with coupons for interest attached to the bonds and payable half-yearly to the bearer, were in the nature of a mortgage to secure a sum of money,

the intestate, and gave notice of the sale for a day certain; and that the intestate died before that day, viz., on the 19th of August, 1809; that the sale of the chattels took place at the day appointed: and the plaintiff purchased them as the highest bidder, and they were delivered to him by the constable; and this he is ready to verify, &c.

The defendant rejoined, that before the said judgment, and before the debt arose for which the said judgment was rendered, the intestate was indebted to the defendant in 200 dollars, which the plaintiff knew

and that the interest thereon was not an entirety, but an accumulation of each day's interest, which accrued *de die in diem*, and was therefore apportionable.

On the other hand, a court of like jurisdiction in Pennsylvania, after a careful review of the earlier English cases, held that not only interest on the debt of the United States, but also interest on the funded debt of a canal corporation, was not apportionable. *Earp's Will*, 1 Parsons, 453, 467.

In this country, it is well settled, that bonds issued by a railroad corporation, payable to order or bearer, are negotiable instruments; and that the coupons, attached to the bonds, and payable in like manner, may be severed from the bonds before the coupons become payable, and, after being severed, may be separately negotiated, the holder may maintain an action upon them at their maturity without producing or owning the bonds, the Statute of Limitations begins to run against such an action as soon as the coupons are payable, and the coupons are not affected by the cancellation or payment of the bonds to which they were originally attached, and are in legal effect equivalent to distinct bonds for the payment of the sums and at the times named therein. *Clark* v. *Iowa City*, 20 Wall. 583, and cases there cited. To hold a sum of money, which is substantially, and in so many aspects, a distinct debt payable at a fixed time, to accrue from day to day upon the principal sum named in the bond, and to be apportionable accordingly, would be going beyond any other precedent which has been brought to our notice.

The bonds of the United States are evidence of money borrowed by the Government in no other sense than the English annuities. They are commonly bought and held by way of investment. The coupons are severable and negotiable separately. *Spooner* v. *Holmes*, 102 Mass. 503. *Vermilye* v. *Adams Express Co.*, 21 Wall. 138. Neither the principal sum of the bond, nor the interest expressed in the coupon, is payable, or can be demanded by the holder, except at stated times fixed by the terms of the bonds themselves and of the Acts of Congress under which they were issued. They appear to us to fall within the general rule of law which does not allow the apportionment of such payments, and not within the rule which governs interest on ordinary debts between individuals.

We have no such Statute as the recent Act of Parliament of 33 & 34 Vict. *c.* 35, enacting that all rents, annuities, dividends, or other periodical payments in the nature of income, "shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." Our Legislature has provided for the apportionment of "an annuity, or the use, rent, income or interest of any property, real or personal, or the income of any fund," only as between those taking successive interests under a will; and has not deemed it necessary, in order to secure the carrying out of a testator's intention, the accuracy of the inventory and appraisal of his property, or the just rights of his legatees, to provide that sums growing due at the time of his death should be apportioned between the capital and the income of his estate. Gen. Sts. *c.* 97, §§ 23, 24. If in this or any other class of cases, not covered by Statute, the existing rule of law should be found inequitable or inconvenient in its operation, it is for the Legislature, not for the court, to change it.

The result is, that the whole of the rents of the real estate, and of the interest on bonds of the United States, which became payable after the death of the testator, is to be treated as income under his will. As to the other bonds and notes mentioned in

when the judgment was rendered, and when the debt arose; that the said chattels were all the goods of the intestate; that the debt or demand of the plaintiff was fraudulent or covinous, and made by the plaintiff and intestate to cheat the defendant and the other creditors of

the bill, no facts are stated upon which an opinion can be formed, and no argument has been addressed to us.

Decree accordingly.

The bill was afterwards amended, by leave of court, by inserting the following description of the bonds and notes referred to in the bill as originally filed: —

"That said bonds and notes were, some of them bonds of the United States with coupons for interest; some of them registered bonds of the United States without coupons; some of them bonds of municipal corporations with coupons; some of them bonds of different States of the United States with coupons; some of them bonds of incorporated companies with coupons; some of them registered bonds of incorporated companies with coupons; some of them registered bonds of incorporated companies without coupons; the principal of all the aforesaid bonds not having become due and payable at the death of the testator, except certain of the bonds of the United States, called five-twenties, which were made payable at the end of twenty years from their date, or at any time after five years from their date at the pleasure of the United States, and upon which the five years had elapsed, but no action had been taken by the United States at the death of the testator; some of them notes of individuals, secured by mortgage or collateral, or with sureties, and being without coupons, the principal of which was not due at the death of the testator; some of them notes of incorporated companies, without coupons, the principal of which was not due at the death of the testator; one note of an individual, without coupons, secured by mortgage, the principal of which was due at the death of the testator; an obligation of the Boston & Lowell Railroad Company, redeemable at a day after the testator's death, either in money or stock, at said company's option, with interest at four per cent annually, on its nominal amount, but without coupons; and some bonds of the Somerset Club, so-called, not a corporation or partnership, with coupons, secured by a trust deed of real estate, and not due at the testator's death, and upon which no individual or corporation was personally liable."[1]

By agreement of parties the case was heard by *Colt*, J., on the amended bill and the answers previously filed, and was reserved for the consideration of the full court.

In March, 1876, the case was submitted on briefs by the same counsel.

Gray, C. J. The brief now submitted for the remaindermen, since the bill has been amended by stating more particularly the nature of the various securities held by the plaintiffs, consists in great part of a re-argument of the question which has been already fully considered and decided. But, owing to the practical importance of the subject, it has been taken under advisement by all the judges, including those who were not present at the former argument, and the opinion now announced is the unanimous judgment of the court.

Apportionment of interest on an ordinary debt is allowed, not because the interest is a sum certain, payable at a fixed time, and therefore easily apportionable; but upon the ground that it accrues from day to day for "delay of payment of what is due," or "for forbearance of the principal," which the creditor is entitled to recall at pleasure. The same rule has been extended to cases in which the debt is secured by bond or mortgage, because the bond or mortgage, although it fixes dates for the payment of the interest, is treated as a mere security for, not changing the nature of, the original obligation; and, as the interest is held to accrue from day to day, it has been doubted whether, strictly speaking, it could be said to be a case of apportionment. Sir Joseph Jekyll, M. R., in *Hay* v. *Palmer*, 2 P. Wms. 501, 502 *ad fin.*, and Cox's note to page

[1] The bonds are more particularly described in a note to the original report. — Ed.

the intestate; and that the judgment was procured by the plaintiff and intestate, to defeat the defendant and the other creditors; that the execution and sale were contrived and intended for the same purpose, and with a fraudulent intent on the part of the plaintiff and the intestate; and this he is ready to verify, &c.

503. Lord Hardwicke, in *Pearly* v. *Smith*, 3 Atk. 260, 261, and in *Wilson* v. *Harman*, 2 Ves. Sen. 672, 673; 1 Swanst. 349, note; 2 Spence Eq. Jur. 578.

We are bound therefore by authority — whatever might be our opinion if it were an original question — to hold that the interest was apportionable, not only upon what is described in the bill as the "note of an individual, without coupons, secured by mortgage, the principal of which was due at the death of the testator," but also upon the "notes of individuals, secured by mortgage or collateral, or with sureties, and being without coupons, the principal of which was not due at the death of the testator;" as well as upon the "notes of incorporated companies, without coupons, the principal of which was not due at the death of the testator," and which, not being otherwise described, we assume to be ordinary promissory notes, such as are usually given for money lent.

But the authorities cited in the former opinion show that, from a time anterior to the American Revolution, it has been clearly settled in England that in the case of investments in the public funds, on which interest was payable at stated periods, and the principal of which might be paid at any time at the option of the Government, the general rule applied, and no apportionment could be allowed, except when provided for by Statute.

Bonds of the United States, the principal of which is not yet payable, must be governed by the same rule. The Government is not, and never was, under any obligation to pay either principal or interest, except at the times stipulated in the securities themselves. There is no possible construction or fiction of law, upon which interest can be said to accrue from day to day upon a principal sum not yet payable, and which the payee has never had a right to demand. His rights, in this respect, are not affected by the question whether the obligation to pay interest is expressed in the principal bond, or in coupons annexed thereto. Nor can the nature or the unity of each instalment of income be affected by the fact whether the principal is to be paid absolutely at a time certain, or at the option of the Government, or at that of the payee, the time not having elapsed, and the option not having been exercised. It follows that no apportionment of interest can be allowed upon any of the bonds of the United States, held by the plaintiffs, except those the principal of which was already due and payable at the time of the testator's death.

The bonds of a State must, of course, be governed by the same rule. And we are of opinion that no valid distinction can be made with regard to the bonds or certificates of counties, cities or towns, or of railroad corporations, copies of which are annexed to the amended bill. They are not like an ordinary promissory note or bond for money lent, which is already due and payable, and of which the debtor has obtained an extension of the time of payment. They are not issued separately for the payment of specific debts, but are commonly purchased and held by way of investment. They are not evidence of any debt whatever from the corporation to the holder, except that arising at the very time of the issue of the bonds, and payable only at the times specified therein.

The so-called note of the receivers and managers of certain railroads in Vermont, and the certificate issued by the Somerset Club, each of which creates no personal or corporate liability, but is to be satisfied, at a future day, only out of a fund held under a special trust, the terms of which have not been made known to us, must, in the absence of any facts to show the contrary, fall within the general rule, and be held not to be subject to apportionment.

Decree accordingly.

There was a general demurrer to the rejoinder, and a joinder in demurrer.

H. Bleecker, in support of the demurrer.

Skinner, contra.

Per Curiam. The defendant justifies, as administrator of Hodges, the taking of the goods in question from the possession of the plaintiff; and he denies the right of the plaintiff to hold them under the judgment and execution which he had against the intestate, because the judgment, execution, and sale were all procured by covin and fraud between the plaintiff and intestate, to cheat the creditors of the intestate; and this fact is admitted by the demurrer. But the case of *Hawes* v. *Leader*, Cro. Jac. 270; Yelv. 196, is an answer to this defence, and completely destroys it. In that case the intestate made a grant of his goods to B. by fraud between him and B. to cheat the creditors, and he kept possession of the goods, and died. B. then sued the administrator for the goods, and he pleaded this covin and fraud and the Statute of 13 Eliz., which declares all such gifts and grants void as against creditors; but, on demurrer, the plea was held bad, and judgment was rendered for the plaintiff, on the ground, among others, that the deed was void only as against creditors, but that it remained good as against the party himself, and his executors and administrators. This ground of the decision is mentioned by Yelverton, in his report of the case, with *quod nota;* and he was counsel for defendant, and his reports are among the best of the old authorities.

The defendant further sets up in his defence, that he was a creditor, as well as administrator of the intestate. This was not stated in his *plea*, but in his *rejoinder;* and it is stated rather as inducement than as matter of justification. It does not, however, alter the case. As creditor, he had no right to take the goods without suit. He was still a *trespasser;* and in his character of administrator he could not attack the judgment on the ground of fraud. His remedy, as creditor, would have been to have sued the plaintiff for his debt, and charged him as executor *de son tort*. This he could have done, notwithstanding he was administrator; and the case of *Ashby* v. *Child*, Styles, 384, is expressly to this point. The plaintiff is therefore entitled to judgment.

Judgment for the plaintiff.[1]

[1] See, *accord.*, *Kinnemon* v. *Miller*, 2 Md. Ch. 407 (1849).

In *Backhouse* v. *Jett*, 2 Brock. 500 (1821), it was *held*, by Marshall, C. J., that property fraudulently conveyed by the deceased to A. was not assets in the hands of A. as administrator of the deceased's estate. But see, *contra*, *Shears* v. *Rogers*, 3 B. & Ad. 362 (1832), where the property had remained in the hands of the deceased until his death.

BUEHLER *v.* GLONINGER.

SUPREME COURT OF PENNSYLVANIA. 1834.

[*Reported* 2 *Watts*, 226.]

ERROR to Dauphin County, Common Pleas.

Replevin by Peter Gloninger against Maria Buehler, William N. Irvine and Peter Keller. George Buehler purchased the goods for which the replevin was brought, and gave his notes for them, with Peter Gloninger, the plaintiff, and George Oves as his securities. The property, at the time of its purchase, was transferred by bill of sale to Gloninger and Oves as their security, but went into the possession of George Buehler, who agreed that Gloninger alone should hold that bill of sale, as a security also for a debt due to him. George Buehler died in the possession of the property, without having paid the debt due to Gloninger, and this replevin was brought against the defendants, who were his administrators, for the goods mentioned in the bill of sale. The defendants, after having shown that they were administrators, had given bond and filed an inventory of the goods of their intestate, offered to prove that George Buehler was insolvent, and that the value of these goods was necessary for the payment of his debts. This evidence was objected to by the plaintiff, and rejected; the court being of opinion that the Statute 13 Eliz. was not applicable so as to bar the plaintiff's recovery, and this was the assignment of error.

H. Alrichs and *M'Clure*, for plaintiffs in error.

Foster and *Weidman*, for defendants in error.

The opinion of the court was delivered by

ROGERS, J. The attention of the court has been particularly directed to two errors on which the plaintiff in error mainly relies. First, the exclusion of evidence of the insolvency of Buehler the intestate; and secondly, that part of the charge which declares that the transfer of the property to the plaintiff and Oves, and to the plaintiff himself, was good against the defendants; and that they can make no defence that Buehler himself might not have made. The points depend upon the same principle, and may be considered together. There is no doubt that the Statute of 13 Eliz. only makes void a deed as against creditors, but not against the party himself, his executors or administrators; as against them it remains a good deed. 5 Binn. 109; 6 Serg. & Rawle, 531; 1 Yeates, 291; 4 Yeates, 95; and in *Osborne* v. *Moss*, 7 Johns. Rep. 161, it is decided, that when a person makes a fraudulent conveyance of his goods to another for the purpose of defeating his creditors, and dies intestate, the conveyance, though void as against creditors, is good against the intestate; and an action may be maintained against the administrator for the goods. The law is the same although the administrator may be a creditor of the fraudulent

intestate. *Horner* v. *Leader,* Cro. Jac. 270; Yelv. 196, which is cited and relied on in *Osborne* v. *Moss*, is to the same point. In *Horner* v. *Leader*, the intestate made a grant of his goods to B. to cheat his creditors, and he kept possession of the goods and died. B. then sued the administrator for the goods, and he pleaded this covin and fraud, and the Statute of Elizabeth, which declares all such gifts and grants void as against creditors. The plaintiff replied that the defendant, the administrator, had assets in his hands to satisfy the debts demanded, and that the deed of gift was made upon good consideration, &c. It is true that the replication was withdrawn, but yet in neither of the cases cited did it appear that there was not sufficient assets to pay the debts. There being no averment that the estate was insolvent, the presumption was, that the administrators had assets in their hands sufficient to pay the debts; and if so, these decisions are in strict accordance with the general principle, about which there is no dispute. Inasmuch as we are to take it, that the estate of Buehler is insolvent, this is substantially a contest between the fraudulent grantee and the creditors of the fraudulent grantor, and as such, comes within the prohibition of the Statute of 13 Elizabeth. The administrator is the trustee of the creditors, and in that capacity is bound to protect their interest. The personal representatives, in fact, have no interest in the controversy, as the case supposes that the assets are insufficient to pay the debts of the intestate.

Judgment reversed, and a venire de novo *awarded.*[1]

NOTE. — As to assets acquired by an executor after his testator's death, see 2 Wms. Exec. (8th ed.) 1662-1667.

[1] But see *Estes* v. *Howland*, 15 R. I. 127 (1885); and cf. *Holland* v. *Cruft*, 20 Pick. 321 (1838). See also *Bethel* v. *Stanhope*, Cro. El. 810 (1601), and 1 Am. Lead. Cas. *43, 44.

CHAPTER VIII.

ALIENATION BY EXECUTORS AND ADMINISTRATORS.

ANONYMOUS.

1536.

[*Reported Dyer* 23 *b*, *pl.* 146.]

KNIGHTLEY asked this question: If two executors have a term, and one grants to a stranger all that belongs to him, how much of the term shall pass? And the COURT thought, that all the whole term passed, inasmuch as each of them has an entire authority and interest in the term, as executor; but of other joint-tenants of a term it is otherwise: so there is a diversity.

NOTE. — In *Hudson* v. *Hudson*, 1 Atk. 460 (1737) there is a *dictum* of LORD HARDWICKE, C., "that one administrator cannot release a debt, or convey an interest, so as to bind the other, and that the case of an administrator differs from that of an executor." But in *Jacomb* v. *Harwood*, 2 Ves. Sr. 265, 267, 268 (1751), SIR JOHN STRANGE, M. R., said that in *Willand* v. *Fenn* the Court of King's Bench, after three arguments, held "that one administrator stood on the same ground and foundation with one executor." (See, however, 1 Selwyn, N. P. (13th ed.) 692 note.) And it seems now settled that there is no difference between executors and administrators in this respect. See *Smith* v. *Everett*, 27 Beav. 446, 454 (1859). Cf. 2 Wms. Exec. (8th ed.) 954.

"One co-executor may release a debt, and do other acts, without his companion, and he may therefore assent to a bequest to himself." So *held* by the Court of King's Bench, in *Townson* v. *Tickell*, 1 B. & Ald. 31, 40 (1819). See *Cole* v. *Miles*, 10 Hare, 179 (1852).

One executor, however, as such, cannot bind his co-executors, by a contract. See *Turner* v. *Hardey*, 9 M. & W. 770 (1842).

THOMLINSON *v.* SMITH.

CHANCERY. 1678.

[*Reported Finch*, 378.]

WILLIAM ADAMS the father of the plaintiffs Mary, Anne, and Joan, being possessed of a term for years of an inn called the Black Horse Inn, situate in St. Thomas Street in Bristol, did about the year 1654, by his last will devise the same to his son Roger Adams for ten years after the decease of his wife, or change of her widowhood, and after

the expiration of the said ten years, then he devised the residue of the said term to his said 3 daughters Mary, Anne, and Joan, equally to be divided amongst them, or to such of them as should be then living, and made his wife Anne sole executrix, *who assented to the said legacies*, and entered and enjoyed the premises during her life; and died about 12 *years* since, about which time there was 18 *years* of the said term to come and unexpired.

After the death of the said Anne, the defendant Richard Smith purchased the interest of the said Roger in this inn, having before purchased the *inheritance;* and after the said ten years were expired, the plaintiffs entered as devisees by the said last will of their father William Adams, and exhibited a bill to have an account, &c., and that the remainder of the said term might be decreed to them.

But the defendant refused to give them possession, claiming the premises by virtue of an *assignment* of the said term to him by Anne *the executrix* of William Adams, in consideration of £150 which he paid to her, the better to enable her to discharge the debts of the said testator, she *not having sufficient assets* for that purpose; and thereupon she delivered up to the said defendant Smith *the original lease;* and that since he entered, he hath laid out several sums of money in the necessary repairing the said inn.

And that since the plaintiffs have charged, that the said Anne the *executrix did assent to their legacies*, they have a proper remedy at law notwithstanding the said *assignment;* and therefore he insisted by his counsel, that they ought not to have any relief in this court.

But the court being satisfied, that the said Wm. Adams left sufficient assets to pay his debts; and that Anne *the executrix did assent to the said legacies*, decreed to the plaintiffs the residue of the said term; and that the defendant should account to them for the rents and profits over and above the rent reserved in the original lease, from the expiration of the 10 years, during the remainder of the said term, according to the value thereof, when the defendant first entered, in case the plaintiffs will accept it.

But if the plaintiffs shall insist to have the account taken according to the present value, then the master to take an account of what money the defendant hath laid out for the necessary repairs and improving the premises; and in taking the said account he is to have respect as well to the interest of the said Anne, and to the term of 10 years which Roger had in the same, as to the plaintiff's interest, and also to the inheritance; and to allow the defendant proportionable shares of all such money by him laid out in repairs and improvement of the rent, out of the money that shall be coming to the plaintiffs.

But if the plaintiffs will accept the account according to the value of the said inn, at the time when the defendant entered, then the master is only to examine what that value was, and accordingly to take the account, and to certify what will be thereupon due to the plaintiffs, &c.[1]

[1] See 2 Wms. Exec. (8th ed.) 937, 938.

HUMBLE *v.* BILL.

CHANCERY. 1703.

[*Reported* 2 *Vern.* 444.]

BILL having a term for twenty-one years in the printing-office, devised (amongst other things) that £2,000 should be raised out of the profits of the printing-office for his daughter, the wife of Darcy Savage, and their children, and made one Garret executor; who first mortgaged the term in the printing-office to Dr. Brown, and the same was afterwards assigned to Sir William Humble for £1,800.

It was insisted, here was no occasion to sell to pay debts, and Sir William having notice of the will, was to take the estate subject unto the £2,000.

But the court was of opinion, that the executor of a testamentary estate had the power over it so as to alien or sell, as he should judge necessary; and that if he sold in prejudice of a residuary or specific legatee, they might have their remedy against the executor, but not follow the estate into the hands of a purchaser; for should that be allowed, no one would venture to buy of an executor; for it would be unreasonable that a purchaser should take upon him to make out the account, as to the *quantum* of the debts or assets; nor is he entitled to have the vouchers to make out such an account; and if such difficulties be put upon purchasers of chattels, &c., from executors, it will follow, that executors will be under an incapacity, and disabled to sell, though there be never so much occasion for it, for payment of debts; and therefore the court decreed an account to the plaintiff of the rents and profits, and to hold and enjoy the printing-office, and defendants to redeem, or be foreclosed.

NOTE. — This decree was afterwards reversed upon an appeal to the House of Lords (1 Bro. P. C. 71).[1]

[1] "I should have hardly assented to the reversal. *Ewer* v. *Corbet*, 2 Wms. 148: The Master of the Rolls seems to think that case has gone too far: it is not a very clear case, but it appears there had been bills filed in chancery concerning it, and that there was a bill depending, when Sir William Humble advanced his money. Garrat, the executor, had been decreed to transfer his trust, so that he was under a decree to transfer, when he mortgaged to Brown, and afterwards to Humble; Mrs. Savage afterwards got another decree. If these were the grounds on which the House of Lords proceeded, I must dissent from their judgment. This was not the common case of an executor mortgaging the property of the testator, which might or might not be for the purposes of the will. There was no lawyer at that time in the House (unless perhaps Lord Somers), and the case was much embarrassed by circumstances." — *Per* SIR RICHARD PEPPER ARDEN, in *Andrew* v. *Wrigley*, 4 Bro. C. C. 125, 137 (1792).

Cf. *McLeod* v. *Drummond*, 17 Ves. 152, 160, 161 (1810).

CRANE *v.* DRAKE.

CHANCERY. 1708.

[*Reported* 2 *Vern.* 616.]

FRANCIS HOOPER, being indebted to the plaintiff £100 on bond, died possessed of a great personal estate, and made his brother William executor and devisee, who wasted the estate: the defendant Drake, having notice of the plaintiff's debt, buys of William, the executor, a leasehold estate by discounting £200 due from the testator, £550 due from the executor, and by payment of £150 in money.

Plaintiff's bill was to have satisfaction for his debt out of the leasehold estate, being part of the testator's assets.

Question was, whether this was a good sale to bind a creditor.

For the defendant it was insisted, that an executor may sell, and with the money, when he has it, may pay his own debts; and for the same reason he may upon sale discount and allow the purchaser the debt he owes him; and the rather in this case, because he paid £150 in money with which the executor might have paid the plaintiff's debt; yet decreed for the plaintiff at the Rolls, and affirmed on an appeal to the Lord Chancellor, he saying the defendant was a party, and consenting to and contriving a *devastavit*.[1]

EWER *v.* CORBET.

CHANCERY. 1723.

[*Reported* 2 *P. Wms.* 148.]

ONE possessed of a term of years, devised it to A. and died indebted, having made B. his executor.

The executor sold the term, upon which the devisee of the term brought a bill against the purchaser, insisting, that the term being devised to the plaintiff, the executor was but a trustee for him, and that the purchaser must have notice of this trust, the term having been bought of the executor, and consequently must be taken subject to the trust.

MASTER OF THE ROLLS. [SIR JOSEPH JEKYLL.] I remember it to have been once ruled, that an executor could not make a good title to a term to a purchaser, and that was in the case of major *Bill* v. *Humble*, 2 Vern. 444.

But since that, I take it to have been resolved, and with great reason, that an executor, where there are debts, may sell a term, and the devisee of the term has no other remedy, but against the executor, to recover the value thereof, if there be sufficient assets for the payment of debts.

[1] See *Doe* d. *Woodhead* v. *Fallows*, 2 C. & J. 481 (1832).

As for the notice of the will, and of the devise of the term to a third person, that is nothing; for every person buying of an executor, where he is named executor, must, of necessity, have notice, so that if notice were to be an hindrance, then of consequence, no executor might sell.

It is not reasonable to put every purchaser of a lease from an executor, to take an account of the testator's debts; nor has he any means to discover them.

On the contrary, as the whole personal estate of the testator is liable to the debts, this lease must (*inter alia*) of necessity be liable, and therefore may be sold by the executor.

If equity were otherwise, it would be a great hindrance to the payment of debts and legacies; and would lay an embargo upon all personal estates in the hands of executors and administrators; which would be attended with great inconveniences.

I admit, if an executor should sell a term for an undervalue, or to one who has notice that there are no debts, or that all the debts are paid, this might be another consideration: but there being no such ingredient in the present case,

Dismiss the bill.[1]

NUGENT *v.* GIFFORD.

CHANCERY. 1738.

[*Reported* 1 *Atk.* 463.]

THE bill was brought against some of the defendants, as trustees of a mortgage term for an assignment, and against others to discover what interest they had in the premises.

It appeared that the mortgage in question, was a mortgage term to trustees in trust for Sir Richard Billings the testator, and Mr. Arundel executor of Sir Richard had assigned this mortgage term to the plaintiff, as a satisfaction for a debt due from Mr. Arundel to the plaintiff.

The question was, if such assignment was good against the daughters of Sir Richard Billings, who were creditors under the marriage settlement, and also to whom the trustees should assign the legal estate.

LORD CHANCELLOR [HARDWICKE]. The question is, if the two daughters, who are allowed to be creditors, are entitled to follow this mortgage term (in the hands of the plaintiff as assignee of it) as specific assets.

I am of opinion they are not, but that the plaintiff is entitled to the benefit of such assignment by the executor.

At law the executor has a power to dispose of, and alien the assets of the testator, and when they are aliened, no creditor by law can follow them, for the demand of a creditor is only a personal demand against the executor, in respect of the assets come to his hands, but no

[1] See *Cole* v. *Miles*, 10 Hare, 179 (1852).

lien on the assets: this court will indeed follow assets upon voluntary alienations by collusion of the executor; but if the alienation is for *a valuable consideration*, unless fraud is proved, this court suffers it as well as at law, and will not control it; for a purchaser from an executor, has no power of knowing the debts of the testator; and if this court, upon the appearance of debts afterwards, would control such purchasers, nobody would venture to deal with executors.

It is objected first, that these were the equitable assets of Sir Richard Billings, and that the plaintiff purchased nothing but an equitable interest, burdened with all the equity in the hands of the person from whom he purchased.

But that is a rule only where there is a lien on the thing itself, and I know no difference in this court, between the power of an executor to dispose of equitable and legal assets.

The second objection is, that the assignee took this assignment with notice, that it was the testamentary assets of Sir Richard Billings.

But if this was sufficient to affect it, it would affect every purchase from an executor, because every such purchaser must have such notice.

The third objection is, that this is a *devastavit*, because the consideration was a debt of the executor's own.

But I know no rule in this court to warrant *that*, neither is there any difference between this and money paid down, provided it be done *bona fide*, a sum of money *bona fide* due, is as good and valuable a consideration as any.

The only authorities relied on are *Crane* v. *Drake*, 2 Vern. 616, and *Paget* v. *Hoskins*, Prec. in Eq. 431. The first greatly differs from the present case, there being express notice of a debt from the testator, still unsatisfied, and a contrivance between the purchaser and the executor, to defeat a just debt, and as Lord Chancellor said, the defendant was a party to, and contriving a *devastavit*.

Here was no notice of any debts due from the testator, for it is sworn in the answer, that Sir Richard Billings died worth £40,000, and this was a debt under a settlement, which is a private transaction in the family.

As to the case of *Paget* v. *Hoskins*, that was a gross sum computed by the wife as her share of her former husband's estate, according to the custom of London, and taken by the husband, subject to that account.

These are the only authorities, and both different from the present case; this I think therefore is a good alienation, and the plaintiff ought to have the benefit of it.[1]

[1] *Nugent* v. *Gifford* "was a term vested in trustees for Sir Richard Billings and his wife. Sir Richard Billings, by his will, gave several specific legacies, and made Mr. Arundel, his natural son, executor and residuary legatee. In 1718, two years after Sir Richard's death, the son had become indebted to Knight, one of the trustees of the term. He assigned to Knight the term, inasmuch as he could, as executor, and there was an account settled between them: there was no bill for an account against

WILLIAMS *v.* LEE.

CHANCERY. 1745.

[*Reported* 3 *Atk.* 223.]

THE bill was brought in order to set aside a verdict and judgment at law, as obtained against conscience.

The defendant pleads the verdict, and judgment in bar.

The case, as stated by LORD HARDWICKE, was as follows:

A specific legacy being left under a will to the defendant in this court, he applied to the plaintiff, who was the executor, and who assented to the legacy, but delaying to deliver it, the defendant brought an action of trover for the legacy, consisting of several specific things mentioned in the will, and had a verdict and £200 damages.

The equity the plaintiff insists upon is, First, that an action of trover would not lie for a legacy.

Secondly, that it is a verdict against conscience, the damages being excessive.

As to the first, it is very extraordinary if a legatee must in every instance bring a bill in this court for the recovery of a legacy against an executor; for though it is said by the plaintiff's counsel, that after a testator's debts are paid, the residue vests in an executor, and the legatee is not entitled to it at law, yet, after an executor has assented, an action of trover will certainly lie for a legacy.[1]

His Lordship allowed the plea.

Arundel. It was not incumbent upon a purchaser from an executor and residuary legatee, to inquire whether the debts were paid. That case may be rightly determined." — *Per* SIR RICHARD PEPPER ARDEN, M. R., in *Andrew* v. *Wrigley*, 4 Bro. C. C. 125, 136 (1792).

"That case, therefore, was decided not upon such general doctrine as we find, relating to this subject, but on these circumstances: that the executor, being also residuary legatee, sold the term to an individual having no notice that there was any debt; who therefore might reasonably conceive that the fund was his to dispose of." — *Per* LORD ELDON, C., in *McLeod* v. *Drummond*, 17 Ves. 152, 164 (1810).

See the case of *Mead* v. *Orrery*, 3 Atk. 235 (1745), and the comments upon it in *Andrew* v. *Wrigley*, 4 Bro. C. C. 125, 136 (1792), and *McLeod* v. *Drummond*, 17 Ves. 152, 164 (1810).

[1] The discussion on the second point is omitted.

WHALE *v.* BOOTH.

King's Bench. 1785.

[*Reported* 4 *T. R.* 625, *note.*]

Action against the sheriff for a false return. Verdict for the plaintiff, damages £35 at all events, and a farther verdict for £368, subject to the opinion of the court on a case reserved.

William Woodham in his lifetime, and at the time of his death, was indebted by bond to the plaintiff in the penal sum of £800, conditioned for the payment of £400 with interest. William Woodham died three years ago, leaving his two sons, William and John, his executors, who on his death possessed themselves of the stock on his farm, and other personal effects to a much greater amount than the money due on the bond. The plaintiff obtained judgment for the said sum, and £35 for costs. On a *fieri facias* sued out, the sheriff returned *nulla bona*. It appeared in evidence that the executors were indebted to their uncle to the amount of £800, and confessed judgment; upon which a *fi. fa.* issued; and goods were levied both of the testator and of the executors for satisfaction of that judgment. The case stated that the uncle knew the goods levied were the goods of the testator. The question was, whether under the circumstances of this case, the executors had so far conveyed away the goods of the testator as to deprive the plaintiff of levying her debt upon the said goods.

After argument by *Bond* for the plaintiff, and *Garrow* for the defendant,

Lord Mansfield, C. J., said, The general rule, both of law and equity, is clear, that an executor may dispose of the assets of the testator; that over them he has absolute power; and that they cannot be followed by the testator's creditors. It would be monstrous, if it were otherwise; for then no one would deal with an executor. He must sell in order to effect the will; but who would buy if liable to be called to an account? It is also clear, that if at the time of alienation the purchaser knows they are assets, this is no evidence of fraud; for all the testator's debts may have been already satisfied; or if he knows that the debts are not all satisfied, must he look to the application of the money? No one would buy on such terms. There is one exception indeed, where a contrivance appears between the purchaser and executor to make a *devastavit*. But nothing of that sort appears here; for the alienation is by execution and a bill of sale. The testator died three years before this transaction; and if the executors paid all demands, the assets belong to them. No demand was made by the plaintiff during all that time; and long before any demand was made, a fair creditor of their own sued out execution. As to fraud, there is none. It is stated, indeed, they knew the goods were the goods of the

testator; but that will not make a fraud, as it is not stated that they knew the debts were unpaid. It is true that the executors might have disputed the seizing of the goods which he had as executor; but they did not object. On the contrary, by being a party to the bill of sale, they assented to it; and this bill of sale, so assented to, is equal to a purchase; and is the same as an alienation by the executors.

Willes and Ashhurst, Justices, concurred.

Buller, J. The case of *Gifford and Nugent* is not unapposite to the present. What is it that constitutes a *devastavit?* Not merely that they knew the goods so disposed of were assets, but that they also knew that there were debts unpaid.

Judgment for the defendant.

FARR *v.* NEWMAN.

King's Bench. 1792.

[*Reported* 4 *T. R.* 621.]

Grose, J.[1] The question upon all these counts is, whether the defendants as sheriffs have made a false return to the plaintiffs' writ; that is, whether there were any goods of the testator in the hands of Reid and his wife to be administered at the time the sheriffs received the plaintiffs' writ of *fieri facias*. The material facts, on which this question arises, are few; William Lewer, the testator, died indebted to the plaintiffs in a sum, which with the costs of recovering that sum amounted to £236 10*s.*; leaving Watts executor, and the widow of the testator executrix. Of this sum £114 12*s.* was due when the *fieri facias* issued. Goods to the value of £200 came into the hands of the executrix, who intermarried with Reid. After the marriage, on the 28th May, 1790, a writ of *fieri facias* against the goods of A. Reid at the suit of W. Wilson, commanding the sheriff to levy £552 14*s.* 6*d.*, was delivered to the defendants. On the same day, and after the delivering of that writ, a writ of *fieri facias*, at the suit of the plaintiffs, was delivered to the defendants, commanding them to levy £114 12*s.* of the goods and chattels of W. Lewer deceased, at the time of his death in the hands of Reid and his wife to be administered, if there were so much, if not £32 costs of the goods of the husband and wife as executrix. Whether there were any goods of Reid, which had not been the goods of the testator does not appear: but it does appear that on the 28th of May, 1790, when the first *fieri facias* was delivered to the sheriffs, there were in the hands of Reid and his wife goods which had been the goods of the testator. It is not stated that those goods had been in any way appropriated by Reid or his wife, or that either of them had paid debts of the testator,

[1] The statement of facts is omitted, as are also the opinions of Ashhurst, J., and Lord Kenyon, C. J., concurring with that of Grose, J.

which they claimed to be reimbursed by the produce of these goods. If these goods were in law bound by the delivery to the defendants of the writ against the goods of Reid, the return is not false: but if they were not so bound, it was a false return.

Before I consider the law, I will say a word upon the justice of the case. And I think no man can pause a moment upon it. Goods are delivered by the law into the hands of a man for the purpose of dividing them amongst the creditors, legatees, and next of kin, of another, whose goods they were. Their value we will suppose £1,000. The debts and legacies we will suppose £500. On the day those goods are delivered to the executor, before the testator's creditors can recover their debts, a *fieri facias* for £2,000 against his goods is delivered to the sheriff. It is urged that these goods, the moment the writ is delivered, are bound to pay the debt of the executor, and that neither the creditors, nor legatees, nor next of kin, shall receive one farthing. The injustice is obvious. It is to make the goods of A. pay the debts of B.; and possibly leave the creditors of A. without any redress but against the person of B. One case of intolerable hardship may be put; suppose the executor indebted to the Crown in more than the value of his own and the testator's personal estate: the moment the executor is invested with his authority an extent issues and sweeps away every shilling of the testator, in fraud of his creditors, legatees, and next of kin; a more shameful act of injustice can hardly exist under the name of law. I hope I can show it to be no more law than it is justice. The ground on which it was and must be argued, is, that the *fieri facias* against the goods of the executor must be executed on the goods of the testator in the hands of the executor. And here I premise that (for argument sake) I shall consider Reid, the husband of the executrix, as if he were the executor. And it is argued that the moment a man becomes executor, the goods of the testator are so vested in him that they are liable to his debts as much and in the same way as his own proper goods are; in short, that in the hands of the executor they are to be considered in all respects as his goods, at least as far as concerns executions against him. In order to see whether that position be well founded, I will consider what in law an executor is, and what interest he has in the testator's goods. One definition (and I think a good definition it is) that I find of an executor is, that he is one, to whom a testator has given his goods, chattels, and personal estate, for the purpose of paying all his debts. And in Wentworth's Office of Executors, page 4, it is said, that "the naming of A. and B. executors is by implication a gift or donation unto them of all the goods and chattels, credits and personal estate of the testator; and the laying upon them an obligation to pay all his debts, and making them subject to every man's action for the same." And this, that is the payment of his debts, being the purpose for which the goods are given, his interest in the goods is not the same as in his own goods: the reason given is, that he hath them not in his own right, but in the right of another; and that "by law he is but the minister

and dispenser and distributor of these goods." 9 Rep. 88 b; Went. 88. That of this there can be no doubt, we need but look into the entries of judgments against executors, and the writs of execution upon those judgments, which are to levy so much of the goods of the testator in his hands to be administered. This shows that the law considers those goods differently from his own goods: it is not to levy so much of *his goods*, which it would have been, if upon their coming into his hands the law had considered them as his: but it is to levy *of the goods of the testator*, considering them, in his hands, still as the testator's. If they are not so to be considered, but as the goods of the executor, it seems that the writ of *fieri facias*, &c., *de bonis testatoris* cannot be executed; but inasmuch as they are in law the testator's, he (the executor) cannot devise them. If he die intestate, the goods of the testator vest, not in his administrator, but in the administrator *de bonis non* of the testator: if he commit felony or treason, although he forfeit his own goods, yet those which he has as executor are not forfeited. For the law, and for the principle upon which the law is founded, I cannot do better than refer to Wentworth's Office of Executors, pages 85, 86, 87, 88; and there we find (page 86) a passage directly applicable to the point now before us: "Whereas a man's goods stand liable to the payment of his debts, both in his lifetime and after, the goods which a man hath as executor are not to be taken in execution for his own debts, either upon a recognizance, Statute, or judgment, had against him. And if such an one die indebted, leaving to his executors much goods which he had as executor, these are not assets in his hands, liable to the payment of his debts, but only for the payment of the first testator's debts or legacies. Therefore a *quo minus* brought by an executor, showing that he was not able to pay the king's debt, because the defendant detained from him £100 which he owed him as executor to F. S. was overthrown; for that it could not be intended, saith the book, that the king's debt could be satisfied with that which the plaintiff should recover and receive as executor." And the reason of this difference is stated in page 88. The passage in page 86 is direct, and what the author states to be law appears to be founded on passages in the Year Books, in Plowden, and in Lord Coke; and appears to have been adopted by Lord Chief Baron Comyns in his Digest, 1 vol. 259 (B. 10), tit. Administrator. His words are, "Nor shall they be taken in execution for the proper debt of the executor or administrator." Upon the same principle we find in 3 Burr. 1369, that the commissioners of a bankrupt cannot seize the testator's goods in the hands of an executor-bankrupt: but a commission of bankrupt is considered as a statutable execution; and if in law the goods are his goods, they vest in the commissioners, and they are bound to take them. Such being the undoubted law as to some of the points I have taken notice of, one may fairly be permitted to ask, Why may not the executor devise the testator's goods? Why may not his administrator take them? Why are they not forfeited to the

Crown on the attainder? Why are they not liable to be seized under a commission of bankrupt against the executor? The answer and reason is, I think, obvious. It is because they are not *his goods;* he is only the distributor and dispenser of them for the benefit of the creditors, the legatees, and the next of kin, of the testator. To permit him to devise them, to permit his administrator to take them, to permit the assignees under a commission against the executor to seize them, and to permit the sheriff under an execution issued against his goods, to take them, would be to dispose of them for purposes for which he had them not, in a way in which it cannot by law be intended that those purposes will be answered. And it seems very difficult to assign any reason why the goods of a testator in the hands of an executor should be privileged from a seizure by the Crown in the case of an attainder of felony, and from a seizure by assignees under a commission, and yet not be privileged from being taken by the sheriff under a *fieri facias* against the executor's goods. On the part of the defendants it has been contended, that if in this case the goods are not considered as the goods of Reid, the husband of the executrix, the doctrine laid down in former cases, in which the executor has been considered as empowered to dispose of the goods of the testator, will be impeached; and it has been argued that this case is analogous to those cases. There I conceive is the fallacy; and that in the two cases there exists a manifest and material difference; and that the determination in this case for the plaintiffs will not at all impeach the law upon which that line of cases is founded. The power of selling or disposing of the goods of the testator the executor must have: it is necessarily incident to his office: without that power his trust cannot be executed; nor can the purposes for which it is given be answered. Therefore when he sells, the law intends that he sells the goods of the testator to answer the purposes for which the power of selling was given; and in so doing he does that which is necessary to his authority, and therefore lawful, just, and right. But in the case before us it is the reverse: it is not necessary for the purpose of discharging the testator's debts, and executing the executor's authority, that the goods of the testator in the hands of the executor should be considered as the goods of the executor, and taken in execution under a judgment to recover a debt due from him. On the contrary, the moment they are taken under this judgment, the power of distributing them for the purposes for which they were given is taken away; and so far is it untrue, that it can be intended that thereby the testator's debts may be paid, that it is most evidently clear that, if suffered, it prevents the possibility of their being paid by the produce of those goods; and the power of distributing them in the way intended by the testator is taken away (and as it is said by law); and so, if it be true, a man is by law compelled to be unjust. For when they are taken in execution for the executor's debt, they are put into another channel; they are applied to a purpose for which they were not given; and the power of doing justice in this respect is taken

from the executor, even if he intend to do it. Surely it cannot be the operation of law to work such absurdity and injustice under the plea of necessity, which clearly does not exist. But cases have been cited, and it was argued for the defendants, that to this purpose is the case in 3 Keb. 839, *Hoyle* v. *Lundon*. That was a "motion to stay execution of goods in the sheriff's hands, being the wife's, as executrix to her former husband, and taken for the present husband's debt; which Rainsford, C. J., and Jones. J., denied, because by payment of the debts of the former husband these goods *may* be the wife's own; and this court will not try this *on affidavit*. And by Rainsford, C. J., in *Norden's Case*, *supra*, last term, it was held that execution against the goods of the executor for debt *in jure proprio* is a *devastavit nolens volens*." The observations upon this case are: first, that whatever was determined was on a summary motion, and by the opinion of two judges only; and secondly, that the ground was that the goods *might* be the wife's own, by having paid debts of the former husband. Therefore it may be fairly inferred that, unless by something done by the executrix they become hers, they are to be considered as the goods of the testator. Here nothing appears to have been done; and no fact is stated to show that by the payment of a debt, or anything else, they had become the wife's or her second husband's. But whether the wife's own or not the court would not in that case determine on affidavit. This therefore they considered as a matter of fact. And here they are not stated to be hers; nor anything done by her to give her a claim to them. And then the Chief Justice alluded to a case which, in the report, is said to be "*supra* last term," but is not to be found; and by which a man is guilty of a *devastavit nolens volens*. That the law will consider a man guilty of doing that which is unjust and unlawful as to third persons, and which the law says must be done, and that it is not in his power to prevent, seems most extraordinary, and appears to be the strongest of all reasons, for saying that that case, if even there were such an one, cannot be law. I have looked in the preceding term for such a case: there is none there; nor is there in Levinz; but in Sir T. Jones, 88, there is reported, as of that term, a determination, of a case of *Norden* v. *Levet;* but in Levinz and Keble the determination is stated as of Trinity Term, 29 Car. 2. That case was in error on a *scire facias* against an administrator, suggesting a *devastavit*. In that case, the administrator, having brought an action of trover in right of the intestate, compounded it by an agreement, that the administrator should discharge the defendant in the action of trover, and that the defendant should pay the administrator £650 at a future day. The question was, whether this was a *devastavit;* and whether he should be liable upon this *de bonis propriis*. It came on several times, and at last it was determined that this was a disposal and conversion to the use of the administrator; and judgment was given for the plaintiff. From the name, the subject, and the time of the determination, I rather think this was the case alluded to by the

Chief Justice, and certainly misapplied by him. The motion in the case cited was the first day of Hilary Term, 1677; and only Rainsford, C. J., and Jones, J., were in court. The case of *Nugent* v. *Gifford*, 1 Atk. 463, proves only that an executor may assign over a mortgage term of his testator, and if he do so, although in payment of his own debt, such assignment is good: and that is founded on the doctrine that an executor may alien the assets of the testator, and when aliened no creditor can follow them; which I admit and say it does not apply to this case; for although he may alien, as the distributor of the goods, yet to every other purpose they are the goods of the testator, and so to be considered, and not his goods. The same observation and answer apply to *Jacomb* v. *Harwood*, 2 Vez. 265; and that case, as far as concerns this cause, proves only that where there are two executors, each may release, pay, transfer, or sell, without the other, any part of the testator's property; which I do not deny. In *Whale* v. *Booth*, Lord Mansfield said, "The general rule both of law and equity is now clear, that an executor may dispose of the assets; and they cannot be followed by the creditors of the testator. *Mead* v. *Lord Orrery*, 2 Vern. 75; 2 Eq. Cas. Abr. 488. And it would be very inconvenient if the creditors could; for then no one would deal with an executor, without examining the whole account of assets. Where the buyer is any way accessory to the contrivance of a *devastavit*, that is a different case: but here it is not suggested; there is no appearance of fraud. The executor might have disputed the first execution, but he consented to it: and I do not see how it then differs from any other alienation. An execution acquiesced under is equivalent to a conveyance." Then the ground of that determination was that under all the circumstances of that case the execution was to be considered as a sale by the executor. If that were the ground, I have given it my answer, as not applicable to the present case; if it were upon the ground contended for in the present case, I say that this special verdict was made for the purpose of reconsidering that case; and reasonably, too, when it is recollected that that ground is totally destructive of the purpose for which the power of the executor is given. But it is said, if this be not the law, no man can safely deal with an executor. That I deny; for a determination in this case for the plaintiffs will not decide that a man may not buy the testator's goods, if the executor choose to sell them. It will only decide that a judgment against the executor's goods does not necessarily bind the goods of another person, who gave them to the executor to discharge his (the testator's) debts and not the debts of the executor. And if it be said that the executor may with this money pay his own debts, and so elude the testator's intention, my answer is, I admit it: it is so, because (as I said before) the power of sale is necessarily incident to his office, and the law intends that he will do what is right: but in considering the goods of the testator as necessarily liable to the execution of a judgment against the executor, the law would compel injustice to be done, and consider the act as unjust,

as it considers the execution which it compels, and which the executor cannot prevent, as a *devastavit* by him. A question may be put, how the sheriff is to distinguish between the goods of the executor and the goods of the testator. Here that question cannot be put; because the sheriffs were informed and had notice that these goods were the goods of the testator, and not the goods of the executor. But I will meet the objection in its full force. The sheriff in this, as in many other cases, must act at his peril: so say Dalton, 146; and Gilbert in his Treatise on Execution, page 21, Dalton, 146, in inquiring into the duty of a sheriff, where there is a doubt respecting the property of the goods, says, "but the safest and wisest course for the sheriff or officer is to inquire by a jury in whom the property of the goods is; or else not to take in execution, or not to meddle at all with any such goods as shall not plainly appear to them to be the proper goods of the defendant; for it seemeth that the officer is bound at his peril to take knowledge whose the goods be, or at least that they be the proper goods of the defendant: but being found by the jury, that excuseth the sheriff." Gilbert, 21, says, "the sheriff is bound at his peril to take only the goods of the defendant; and if he doubt whether the goods shown him be the defendant's, he may summon a jury *de bene esse* to satisfy himself, whether the goods belong to the defendant or not. This will justify him in returning, that the defendant has no goods within his bailiwick, and mitigate damages in an action of trespass, if the goods seized should not happen to be the defendant's." If this would be a sufficient answer in the mouth of the sheriff, what are we to say to cases of a much severer line of justice; cases, where a sheriff is considered a *tort-feasor* by relation; cases of bankruptcy? In the present case upon information given to the sheriff that the goods were the goods of the testator, unappropriated by the executor, and on which he had no demand, he might have summoned a jury; and had the jury found them to be the goods of the testator, not of the executor, he would have been justified in returning *nulla bona*. Upon these grounds it seems to me that the goods of the testator, upon the facts stated in this special verdict, were not in law the goods of the executor liable to an execution against him, but at the time when the *fieri facias* against the goods of the testator was delivered to the sheriffs, continued and were the goods of the testator, liable to the execution against his goods; consequently that the execution delivered to the sheriffs against the goods of the executor did not bind the goods in his hands that remained unadministered; but when they received the writ to levy the debt of the goods of the testator, there were goods which they might have taken in execution of that writ.

In this way of considering the question there is no occasion for me to enter into a head of argument much discussed at the bar, how far these goods being vested in the executrix are in consequence of the marriage liable to be taken in execution for the debt of her husband; as in my opinion this action would have been maintainable, had the husband been the executor, and not merely the husband of an execu-

trix. Nor do I consider the difference in point of law, whatever it may be in point of justice, that is made by the notice given to the sheriffs, that the goods were the testator's; because if my opinion be right, the sheriffs must at their peril execute the writ, and make a true return. In this case they have not so done, as they have returned *nulla bona* to the *fieri facias* against the goods of the testator, when there were goods of the testator which they might have taken in execution of the writ. Therefore I am of opinion that, such return being false, the action is well supported, and that the plaintiffs ought to have judgment.

Buller, J. This is an action against the sheriff for a false return to a *fieri facias*. The special verdict states that in Easter Term, 30 Geo. 3, the plaintiffs recovered against Watts and Reid and his wife, executors of W. Lewer, £236 10*s.*; and on 17th May, 30 Geo. 3, sued out a *fi. fa.* to levy that sum of the goods and chattels, which were of Lewer in the hands of the executors to be administered. That on 28th May, 1790, the writ was delivered to the defendants, then sheriff. And that in Easter Term, 1790, Wilson recovered against Reid £1,047 debt, and 63*s.* damages and costs; which judgment was signed 27th May, 1790. That on 28th May, 1790, Wilson sued out a *fi. fa.* on that judgment, tested 17th May, which writ on 28th May, 1790, and a few hours before the delivery of the plaintiffs' writ, was delivered to the sheriff, who under that writ, a few hours before the delivery of the plaintiffs' writ to him, seized goods in a house, wherein Reid and his wife resided, and in which house Lewer at his death did reside; and which goods were the goods of Lewer. That on the same 28th May, 1790, after the sheriff had seized the said goods, the attorney for the plaintiff gave notice to the attorney for Wilson, and also to the sheriff, that the goods so seized were the goods of Lewer in the possession of Reid and his wife, as executors, liable to the payment of the debt recovered by the plaintiffs, and also liable to the payment of £116 recovered by one Stedman, and not liable to the payment of any debt of Reid; the same not being sufficient to satisfy the said judgment and other debts of Lewer; and that the said attorney meant to take out executions on the said judgments; and unless they quitted possession, actions would be brought against them. That afterwards on the said 28th May the attorney for the plaintiffs procured a warrant from the defendants, then sheriff, on the writ of *fi. fa.* mentioned in the declaration, which warrant was on the same day delivered to the officer to be executed. That the officer went with the warrant to the house where the goods were before they were sold, but did not levy thereon; and the sheriffs afterwards returned *nulla bona* to that writ: and then the jury find that, by means of the premises, the plaintiffs are hindered from recovering their damages, and have lost the same.

The general question referred by the jury to the court is, whether the plaintiffs are entitled to recover. This special verdict seems to me to be very imperfect and incorrect; for when the plaintiffs' debt became due, when Lewer died, how long his executrix continued a widow,

when she married Reid, how long he had been in possession of the goods, and what use he had made of them, the verdict is totally silent about. It may be true that the debt was of ten years' standing; that the negligence of the plaintiffs was gross and outrageous, and calculated merely for the purpose of suffering the executrix and her (present) husband to enjoy and to use these goods as their own without the danger of any other persons, who happened to be creditors, being troublesome on account of them. That there must have been a great negligence on the part of the plaintiffs is apparent; but for how long a time, or for what reasons that happened, the court are not informed. Since the plaintiffs' debt became due, the testator has died, one executor has died, and the other has married again; and though the notice of the 28th May only states that the plaintiffs intended to sue out execution, yet the verdict finds that they did sue out execution on the 17th May; and that they suffered that to lie dormant till the 28th of May, and till after Wilson's execution was executed. Why that was done we are not told. The question is whether upon this finding (such as it is) the plaintiffs are entitled to recover; and I am of opinion that they are not. When this case was before the court in Hil. 1791, the court sent it to a new trial for the purpose of inquiring whether there were any fraud between Reid and his creditor. That inquiry I conceive to be the true and only material one in the case. Upon this special verdict the jury have found no fraud; and therefore we are bound to say there was none. If the inquiry directed by the court in Hil. 1791 were at all material, the circumstance of no fraud having been found by the jury would alone be sufficient to decide this case for the defendants. But I will suppose all that to be immaterial; and stating only that no fraud is found in this case between Wilson and Reid,

I will consider, first, the authorities and arguments which have been urged on the part of the plaintiffs; and secondly, the authorities and reasons which occur to me on the part of the defendants.

For the plaintiffs several cases were quoted from the Court of Chancery, to which my answer is, that none of them are of the least avail in a court of law; because the two courts act on different principles; and that which is the ground-work and foundation of the decision in courts of equity is directly repugnant to every rule and determination of the courts of law. Where a rule of property is settled in a court of equity, and there are no decisions against it at law, I am as ready as any man to follow the line of equity; for I think it absurd and injurious to the community that different rules should prevail in different courts on the same subject. But before we adopt the doctrines of courts of equity we must see that we do not act in violation of settled rules of law, and that we have the power of following up the relief given by a court of equity to that extent, which makes their proceedings just and reasonable. The Court of Chancery consider the fund as debtor; and therefore they pursue that; collect it all into their own hands, under the notion of taking an account; call all persons before them, who have

any demand on that fund; and distribute it amongst all, according to their priorities at law, (if they have any,) or if not, equally. But that court has never said that, if the effects of a testator get *bona fide* and for a good consideration into the hands of a third person, they will take them from him. The case of *Elliot* v. *Merryman*, 2 Eq. Cas. Abr. 450, proves directly the contrary. This court cannot call all the creditors together; they cannot compel an account of all the effects, or administer the same relief which equity does; therefore we must not be governed by the rules of equity on this subject. At law there is no such thing as a *fund* in the hands of an executor being the *debtor;* but the *person of the executor, in respect of the assets which he has in his hands, is the debtor.* If he admit (or, which is the same thing, do not deny) assets, the judgment and execution are to levy the debt out of the assets in his hands, because he is sued as executor, and is liable in respect of them. But he is not permitted to say, "You have recovered against the assets, and therefore you must find them, or go unpaid." On the contrary, if he do not produce them, or they cannot be found, he (the executor) immediately becomes *personally* liable in an action of debt, suggesting a *devastavit;* and it is no answer for him to say, "Then, here are the testator's goods; take them, and let me go." *Rock* v. *Leighton*, 3 T. R. 690. The authorities at law quoted at the bar in behalf of the plaintiffs are very scanty indeed; but such as are at all applicable to the case ought to be considered. Those are 1 Com. Dig. 259; and Plowd. 525; and they were cited to prove that the goods of a testator shall not be taken in execution for the debt of the executor. If this be true to the extent which the words import, it decides the question. But the contrary has been adjudged, as I will show presently. Comyns quotes no authority for this position: but on the contrary there are several passages in the same page, which say that the property vests in the executor, and that even before actual possession. I think it very probable that Lord C. B. Comyns had in his mind a reference to the case in Plowden, when he wrote that; but Plowd. warrants no such thing. He says, in the page cited, if the executor die, the testator's goods shall not be taken for the executor's debt. And afterwards it is said, goods which were the first testator's shall not be put in execution for the debt of the *last* testator; for the last executors have them as the immediate executors of the first testator. But that is not this case; nor at all like it. Upon the second argument it was thought to be material to ascertain in whom the property was; and it was contended, that these goods never were the property of any person but of the testator in the hands of his executors to be administered. But Comyns, on whom they rely, decides this point against them: for he says they are *the property* of the executors; and to say that a man has a property in goods after he is dead, or that because they were once the property of a man who is dead, they are now the property of no one, are propositions which cannot possibly be maintained. On the contrary, it is settled by many of the cases quoted

at the bar that the property is vested in the executrix, and that she or her husband may grant, alien, give, or release them. If an executor grant all his goods and chattels, not only his own, but also what he has as executor, shall pass. 2 Roll. Abr. 58, pl. 8; 1 Leon. 263; and Shep. Touch. 94. So if he have some cause of action for himself, and some for his testator, and he release all actions indefinitely, this release doth discharge both sorts of actions. Shep. Touch. 339. If any tenderness had prevailed, or alarm been taken, about making the executor guilty of a *devastavit*, all these cases should have been determined the other way. But the law goes on more general, and on broader, principles. It says the property is the executor's; and whatever is his property may be taken for his debt. If he owe one debt on his own account, and another on account of the testator, (provided he ever had assets sufficient,) he is liable for both: if he can pay only one, he must go to jail for the other; and it is indifferent to him for which debt he does go to jail. If ever he had assets sufficient, it is perfectly immaterial whether he has them now, or what is become of them. And as to the creditor of the testator, when the property gets into other hands, he must use due diligence, or abide by the loss. If the executor be not insolvent, he will still recover his debt; and if he be insolvent, still the creditor may have the highest execution which the law knows, and that is against the body. Whether the husband of the executrix in this case be insolvent or not nowhere appears; and if he be not, the plaintiffs are disputing *de lana caprina*. The case, most analogous to that of executors, is the case of baron and feme, where the wife has a term of years vested in her before marriage. By the marriage the husband acquires a right to dispose of that term; but unless he do some act to dispose of it, upon his death it will survive to the wife. If he dispose of it partially only, the remainder will belong to her. But yet such a term may be taken in execution for the husband's debt; and it does not depend on his assent or dissent whether it may be taken or not. But *nolens volens* the creditor of the husband has a right to be satisfied out of it. There an execution is equivalent to a grant or conveyance by the husband; and *pari ratione*, I think the execution in this case is equivalent to a sale; which (on all hands it is admitted) would be good. The plaintiffs should have followed the advice of Dodderidge, J., in Touch., page 458, who says, "It is policy for a creditor who hath cause to sue an executor to be doing betimes, and to get judgment and execution as soon as he may; for it falleth out in this case that he who doth first come shall be first served." If goods be taken out of the hands of an executor, he must bring trespass, as for his own goods. But the great stress of the argument on the part of the plaintiffs is, that notice was given to the sheriffs that these goods were the property of the testator, and that the plaintiffs were creditors of his, and intended to sue out execution. This argument stands destitute of all authority whatever. But I will not pass it over, without considering what could or could not be the effect of notice in

such a case. The defendants were sheriffs; and they had seized the goods in question for a debt of Reid's; those goods then being in his possession, and he then using them as his own. If the sheriff acted legally in seizing the goods, he was bound to proceed in the execution; and a subsequent notice would not make that unlawful, which was lawful at the time. If the seizure were unlawful, the sheriff was liable to an action, without any notice; and if it were not unlawful, no notice could make it so. A notice in such a case as this is a perfect novelty, unknown to the common law with regard to any effect which it could have. But it must not be forgotten that we are now in the case of the sheriff; and therefore we must examine what he could do to protect or indemnify himself. Suppose the contents of the notice were all false; how was the sheriff to try whether they were true or false? But they may be all true, and yet the sheriff not be protected in abandoning the execution. For suppose the plaintiffs' debt were of ten years standing, and a plan formed between the plaintiffs and the executrix that she should enjoy the goods for her own use, and that the plaintiffs would not molest her, unless the goods were seized by some other person. Or supppose the executrix had paid debts to the amount of all the effects, or only to the amount of these goods; in such case the property would clearly have become absolutely and entirely her own. For Plowd. 186, says, "if an executor pay the testator's debts with his own money, he may retain to the value out of the testator's goods, as his own proper goods." How is the sheriff to try any one of these questions? It should be enough for him that the goods are in the possession of the debtor, and used by him as his own. When the plaintiffs' execution came to the sheriffs' hands they could not take these goods under it. The writ commanded the sheriffs to levy the debt *of the goods and chattels of the testator in the hands of Reid and his wife* to be administered. These goods were not then in their hands, but they were in the hands of the sheriff, and *in custodia legis*. And in Holt, 643, and 1 Show. 174, it was resolved by Holt, Ch. J., that goods being once seized and in custody of the law, they could not be seized again by the same or any other sheriffs. The same point is said to have been resolved by him in court the day before, in his argument between *Etkins and Western*, and not denied by any of the judges. So the sheriff cannot take goods which have been distrained. *Tully and Another* v. *Peachey*, Hil. 23 Geo. 3. In my opinion it is highly inconvenient to the public that goods should ever be so fettered or limited as not to be liable to the debts of those who have the enjoyment, and are suffered to appear as the real owners, of them. Some cases have gone a great way on that subject; and, as far as they have gone, perhaps we may be bound by them. For the same reason I think we ought to be bound by other cases, which I shall mention presently: more especially as they seem to be founded on good and plain principles of law and convenience too. I see no inconvenience in saying that any man, who will trust goods to another on his personal credit to use as his own, shall have no remedy

in case the goods are seized, but against the person to whom he has so given credit, and whom by those means he may have enabled to draw in unwary tradesmen. A contrary doctrine would introduce great uncertainty and inconvenience. It would embarrass honest creditors, and no man would be safe in levying his debt under an execution, provided his debtor were clothed with the character of an executor to another. For if he should take one article out of an hundred, which was once the property of the testator, he must submit to be ruined by an action; and that is to be done without the possible means of his knowing whether there were any, and what, debts of the testator's unpaid; or whether the goods seized were originally the property of the testator or executor. For he, having no demand on the testator's effects, cannot even in equity call for an account of the testator's debts and effects: nay, even if he could do so, his situation would not be bettered; for that would only be giving seasonable notice to his debtor to dispose of his property, and put himself beyond his creditor's reach. But independently of all arguments *ab inconvenienti*, I think this point has already been decided; and that we are bound by the decisions of *Hoyle* v. *Lundon*, 3 Keb. 839, and *Whale* v. *Booth*, M. 25 Geo. 3. In *Hoyle* v. *Lundon* the motion was to stay the execution of goods in the sheriff's hands, being the wife's, as executrix to her former husband, and taken for the present husband's debt; which was denied, because, by payment of the debts of the former husband, these goods may be the wife's own, and this court will not try this on affidavit. And by the Chief Justice "in *Norden's Case*, last term, it was held that execution against the goods of the executor for debt *in jure proprio* is a *devastavit nolens volens*." It is stated as clear law, and will not now be denied, that by payment of the husband's debts the goods become the property of the executrix. This is not at all qualified by the manner in which the motion came before the court. But the most decisive part is what is stated by the Chief Justice to have been done in *Norden's Case*. It is impossible to suppose that the Chief Justice did not know what he himself had done in the last term; and the book is express that an execution against the goods of an executor for his own debt is a *devastavit nolens volens*. If it be so *nolens volens*, there is an end of all question about the acquiescence or assent of the executor, for he has not the power of assenting or dissenting; and let him dissent as much as he will, yet the execution is good. This is necessarily implied in the terms *nolens volens*. What was said by Lord Mansfield in the case of *Whale* v. *Booth*, which has been much relied on by the counsel for the plaintiffs, about acquiescence and consent was not necessary in the case; for nothing was said in the case about assent or dissent; the executor was no party to the cause; and it was perfectly immaterial there whether the executor could or could not have avoided the execution. His Lordship said the general rule of law and equity was clearly settled, that an executor may dispose of the assets of the testator, *and the creditor cannot follow them.*

If the law were otherwise, nobody could deal with an executor without taking an account of the whole estate. It is likewise clear that when he aliens, the *purchaser must know they are assets*, and yet that is no objection. He may alien for a debt of his own. Then his Lordship excepted the case of fraud or contrivance to enable an executor to commit a *devastavit*. This case (says he) comes within *the principle*, that is, the principle before mentioned: and a sale under an execution is equivalent to a sale by the executor himself. If (says his Lordship) an executor has paid all the debts, the effects are his own; and a stranger or third person cannot tell whether he has or not. From hence it necessarily follows that in the case of a stranger it is immaterial whether they be paid or not. Then follow the words which have been so much commented upon, namely, "when the goods were taken the executor might have disputed it, and said they were the goods of the testator: but he did not. He consents to it." But his Lordship concludes "*It cannot be distinguished from an alienation by the executor.*" I have already stated that what was said in that case about consent was not necessary in the cause; and I cannot conceive how the executor, of all people in the world, should be permitted to dispute the execution. He is indebted to two persons; he keeps and uses the goods, and pays neither. If either of them seize the goods, I should think he could not object to it; and indeed the case of *Hoyle* v. *Lundon* fully proves that proposition. At law, he who first comes must be first served; and if the goods of a testator be taken for the proper debt of the executor, the executor will become personally liable to the creditor of the testator. And as to the creditor who seizes the goods, *though he know they were part of the assets*, yet according to what Lord Mansfield said in *Whale* v. *Booth*, it is no objection; for there can be no difference between a purchaser and a creditor under an execution. If it be no objection against the creditor, *a fortiori* it cannot be against the sheriff. But (for argument sake) I will suppose that the executor might have disputed the execution, yet that will not avail the plaintiffs in this cause; for they are not executors; the executor has not disputed the execution, or taken any part in the business; and if his consent were necessary, I say his not objecting is assenting. In this case, as in *Whale* v. *Booth*, the plaintiffs are creditors of the testator's, and the defendants are sheriff; and therefore that case is a direct authority in point for the present. The only difference between them is that in the present case there was notice; but that cannot alter the law, except in cases where the law itself requires notice: and besides the notice was not by the executor but by the attorney for the plaintiffs, the creditors. Again, even supposing that there may be cases, the existence of which I deny, in which a creditor of an executor cannot seize the goods of the testator, yet there is still another case upon the authority of which the plaintiffs ought not to have judgment on the facts found by this special verdict. For in *Aylesbury against Harvey*, 3 Lev. 204, a replevin was brought for a silver

cup, and the defendant justified by a condemnation before the justices of peace upon the Statute of Excise for the non-entry of strong waters, and a warrant made to levy a fine of 20*s.* set on the plaintiff for it. The plaintiff replied that J. S. made him executor in 1666, and he had this cup, *and yet has it as executor.* Several objections were made at the bar; but the point that the testator's goods could not be seized for the debt of the executor was not thought even to be arguable. But at the end of the case it is said the court did not regard the plea that he had it as executor so long ago, but they would intend the property altered, notwithstanding the *adhuc habet;* for it would be very perilous to all officers, if such pleading were allowed. The question whether the goods of a testator may in all cases be seized for the debt of the executor was not agitated there; but if it had been, the argument of its being very perilous to all officers would have applied as powerfully as it did to the particular case. The point adjudged was, that in the case then before the court (however the law in general might stand) the goods of the testator might be taken for the debt of the executor; and if time be material in the decision of this question, and it be clear that in some cases they may be so taken, then it was incumbent on the plaintiffs before they could do away the former execution, and charge the sheriff, to show that they came within due time; but that they have not done. The case in Lev. is a direct authority against the general position in Comyns; and there is no case whatever, which says that a creditor under any circumstances may maintain such an action as the present. This does not appear upon the record to be a case in which the executrix herself could object to the first execution, if she had been willing and able so to do. But even if she could, still it remains to be proved that a creditor may make that objection; for which no authority has been quoted. It also seems to me that before judgment can be given for the plaintiffs, the court must be prepared to say that though the executrix may have paid more in discharge of the testator's debts than ever came to her hands, and though sufficient assets may remain to satisfy the plaintiffs' debt, yet that the creditor of the husband could not seize any goods which ever had been the testator's. For it is not found by this record what were the value of the assets, or the amount of the debts, or what the executrix has paid, or whether there are or are not assets remaining sufficient to satisfy this debt. The jury have said that the sheriff seized goods in the house wherein the executrix of her husband lived, and in which house the testator lived at his death, and which goods were once the goods of the testator, and were then in the hands of the executrix and her husband: but they have omitted the common words, that the goods were *in their hands to be administered.* Whether the goods had been sold at an auction, and the executrix bought them in, and applied the produce in payment of debts, or in what right she had them at the time of the execution, the court is wholly uninformed; and therefore this case is infinitely looser than the case in 3 Lev. 204, where the words "that the defendant yet

has it as executor" were holden insufficient. The sheriff, it is true, has returned *that there are no assets in his bailiwick*, whereof he could levy the damages; but that will not supply the defect of the verdict; neither will the repetition of the inference and conclusion drawn by the close of the declaration "that by means of the premises the plaintiffs have been greatly retarded and hindered from obtaining their damages and lost the same" serve the purpose; for that is an inference without a fact to support it. In every light in which I have been able to put this case, I am of opinion that there ought to be judgment for the defendants.[1]

Morgan and *Bearcroft*, for the plaintiffs.

Wood and *Erskine*, for the defendants.

HILL *v.* SIMPSON.

CHANCERY. 1802.

[*Reported* 7 *Ves.* 152.]

JOHN SMITH by his will, dated the 18th of January, 1785, among other legacies, gave to Jane Pearson the sum of £200 to be paid to her immediately, or as soon as possible on the death or marriage of his wife Elizabeth Smith; and he left Charles Rushworth £50, to be paid at the death of his said wife; and he appointed John Lush and his said wife Elizabeth Smith, executors. The testator died on the 23d of May, 1785; and his widow and Lush proved the will. Lush died on the 26th of January, 1796; and on his death, Elizabeth Smith possessed herself of all the personal estate of her late husband.

Elizabeth Smith by her will, made in 1790, directed all her debts, funeral expenses, and the expenses of the executors, to be paid; and, subject thereto and to her late husband's will, she gave, devised, and bequeathed, all and every the moneys, real and personal estates, securities for money, goods, chattels, and all other her estate and effects, to her nephews Joseph Simpson, William Thorley, and Henry Wright, and to the survivors and survivor of them, their and his executors and administrators; upon trust to convey the freehold property, consisting of two messuages, to her two nephews John Simpson and James Simpson; with remainder over to Joseph Simpson; and after giving some legacies she appointed Joseph Simpson, Thorley, and Wright, her executors.

Elizabeth Smith died on the 5th of April, 1797; leaving Joseph Simpson her heir at law; who alone proved her will; and possessed himself of her real and personal estates, and of part of the personal estate of

[1] See *Quick* v. *Staines*, 1 B. & P. 293 (1798); *McLeod* v. *Drummond*, 17 Ves. 152, 168, 169 (1810); *Ray* v. *Ray*, Coop. 264 (1815); *Gaskell* v. *Marshall*, 1 Mood. & R. 132 (1831).

John Smith. At her death there were standing in the name of John Smith in the books of the Bank of England £50 Five per cent Navy Annuities; £275 Four per cent Consolidated Annuities; £60 Short Annuities; and £550 Three per cent Reduced Annuities; which funds Simpson transferred to Moffatt & Co., his bankers, as a security for such sums as he then owed, or might afterwards owe them. In 1798 a commission of bankruptcy issued against him.

Thomas Hill married Jane Pearson; and they and Rushworth, who was then an infant, filed the bill against Simpson and Wright, Thorley being dead, and against the assignees and the bankers; praying, that it may be declared, that the funds transferred by Simpson to the bankers are liable to the legacies of the plaintiffs, &c.

The defendants Moffatt & Co. by their answer stated, that about February, 1794, the defendant Simpson opened an account with them as bankers; which continued till his bankruptcy; in the course of which he drew a great number of bills on them; and was always or for the most part in their debt on the balance of such account; for which they repeatedly pressed him; and frequently refused to accept and pay his bills, until he remitted money to discharge or lessen such balance; and informed him, they would not continue such account; unless he made remittances to answer his bills. On the 11th of May, 1797, he was indebted to them £399 18*s.* 5*d.* besides other bills, which they had accepted for him, not then due; and he called upon them; and represented, that he was under the necessity of providing a very large sum of money immediately; and requested them to advance it; and to induce them to do so offered to transfer the funds mentioned in the bill as a security as well for the balance then due, as also what they should advance to him for his then occasions, and also all other sums, which they should at any time hereafter pay on his account; and these defendants having at the earnest solicitation of Simpson agreed to advance the money, which he had then immediate occasion for, he on the 11th of May, 1797, transferred to them £100 Three per cent Consolidated Annuities, and the several sums of stock mentioned in the bill. The £100 Three per cents were then standing in the names of Lush and Elizabeth Smith; and all the other funds in the name of John Smith; which the defendants knew, by reason that at the request of Simpson they received the dividends under a power of attorney granted by Elizabeth Smith; which they always placed to the credit of Simpson's account with them.

They denied, that they knew, or suspected, that the funds were not at the time of the transfer the absolute property of Simpson as executor or devisee of Elizabeth Smith; or that they were part of the personal estate of John Smith; on the contrary they believed, they were Simpson's own property: and he represented to them, that he was absolutely entitled thereto, subject only to an annuity of £20 to Elizabeth Smith's sister during her life, and to a few very small legacies; that he had full right to dispose thereof; and would have disposed but for

the low price of the funds; which he expected would rise. They also stated, that they did not know any of the legacies of John Smith to the plaintiffs or any other person were unpaid. The answer then set forth a letter from him to them, dated the 20th of April, 1797; stating the death of Elizabeth Smith; that she had left him the whole of her property, both real and personal, paying £20 a year to her sister for life, then seventy-six years old, and a few very small legacies; that he intended to be in London by the 28th; supposing her will must be proved in London, on account of the money in the funds; and stating his intention to produce the will to them, before he should do anything, as being well assured, they would advise him for the best to save expense.

The answer then stated, that in consequence of the said transfer, and upon the faith, credit, and validity thereof, the defendants on the 13th of May, 1797, paid bills and notes on account of Simpson to the amount of £673 1*s.* 6*d.* then outstanding; which they believe was the sum or part of it, which he was anxious to provide for. On the 16th of February, 1798, he gave the defendants the following authority in writing: —

LONDON, 16th February, 1798.

Messrs. Moffatt, Kensington, and Styan.

GENTLEMEN: — Having some time back transferred into the name of your partner, Mr. John Pooley Kensington, sundry sums of different stocks and annuities as a security for any advances or engagements, which you might at that time have come under, or might at any future time come under, for me, I hereby authorize you to sell or otherwise dispose of the same, whenever you may think proper, at my risk, and for my account; and I will confirm and approve of the same; and will, whenever required by you, execute a legal instrument to that effect.

JOSEPH SIMPSON.

The answer farther stated, that upon the faith of the said transfer and security of the said funds the defendants did after such transfer and on the credit thereof pay the bills of Simpson to a much greater amount, and suffered him to be in arrear to defendants in a much larger balance than they had before done; insomuch, that on the 21st of June, 1798, when Simpson became bankrupt, he was indebted to defendants on the balance of accounts in £1,435 19*s.* 6*d.* They never had any other security; except, that Simpson and Elizabeth Smith executed a bond to them, dated the 22d of December, 1795, for securing any balance, which might be due from Simpson in account between him and them, and the bills, drafts, and notes, paid to them as his bankers; and which, when received, they placed to the credit of his account with them.

The answer was replied to; but the plaintiffs did not go into evidence.

Mr. Cox and *Mr. Fonblanque*, for the plaintiffs.

Mr. Stanley, for defendants in the same interest.

Mr. Piggott and *Mr. Trower*, for the defendants, the bankers.

THE MASTER OF THE ROLLS. [SIR WILLIAM GRANT.] The question is whether the plaintiffs, legatees, can follow the assets in the hands of third persons, to whom the executor has transferred them. There is [no] evidence in the cause but the answer. I cannot therefore infer anything against the defendants, which they do not admit; for it was in the power of the plaintiffs to procure an explicit admission or denial of every fact, within the knowledge of the defendants. I cannot assume, that they ever saw Mrs. Smith's will; though Simpson says, he was to produce it to them; for they do not say, they ever did see it. Without doubt the plaintiffs are entitled to a decree against the executor, now a bankrupt; and his assignees are parties.

Several well known cases were referred to on both sides. The defendants rely upon *Nugent* v. *Gifford*, 1 Atk. 463; *Mead* v. *Lord Orrery*, 3 Atk. 235; and *Whale* v. *Booth*, 4 Term Rep. B. R. 625, *note*, as establishing the absolute right of the executor to bind the assets by any disposition; at least, where there is no actual fraud in the party taking under it. The other cases, *Humble* v. *Bill*, 2 Vern. 444; *Crane* v. *Drake*, 2 Vern. 616; *Farr* v. *Newman*, 4 Term Rep. B. R. 621; *Bonney* v. *Ridgard*, 2 Bro. C. C. 438; and *Andrew* v. *Wrigley*, 4 Bro. C. C. 125, are relied on by the plaintiffs; as showing, that there are limits to that rule; which limits they contend are here transgressed. Though it is difficult to reconcile all the doctrine and *dicta*, that are to be found in the cases, the decisions do not appear to me to be inconsistent. It is true, that executors are in equity mere trustees for the performance of the will; yet in many respects and for many purposes third persons are entitled to consider them absolute owners. The mere circumstance, that they are executors, will not vitiate any transaction with them; for the power of disposition is generally incident; being frequently necessary; and a stranger shall not be put to examine, whether in the particular instance that power has been discreetly exercised. But from the proposition, that a third person is not bound to look to the trust in every respect and for every purpose, does it follow, that, dealing with the executor for the assets, he may equally look upon him as absolute owner, and wholly overlook his character as trustee; when he knows, the executor is applying the assets to a purpose wholly foreign to his trust? No decision necessarily leads to such a consequence.

In *Nugent* v. *Gifford* it appears from the Register's Book, as stated in *Andrew* v. *Wrigley*, though not in the report in Atkyns, that the testator died two years before the executor and residuary legatee made the assignment, that was impeached. At least therefore there was room to suppose, that the executor might in that period by advances on account of the trust have entitled himself to reimbursement out of the assets: but even so explained, the late Master of the Rolls would not go farther than to say, that case might be rightly determined; and in *Scott* v. *Tyler*, Lord Thurlow said (2 Bro. C. C. 477), it was difficult to reconcile it with *Crane* v. *Drake*. In *Mead* v. *Lord Orrery*, Lord Hardwicke, instead of stating shortly and generally, that an executor has the absolute right

to dispose, as he pleases, of the testator's property, enters into all the circumstances to show, that in that case the assignment ought to stand; that it was made several years after the testator's death; that it was not the case of a sole executor disposing for his own benefit, but of three executors, two not interested, one a residuary legatee; that, as he was one of the executors, and in his banking shop the money affairs were transacted, he might have been, as he was recited to be, the sole owner of the mortgage: he might be a creditor for that sum by advances made by him: or it might have been released and assigned to him by the other executors, as his share of the residuary estate. Under all those circumstances perhaps it would have been hard to have deprived the assignee of the benefit; and yet Lord Kenyon in *Bonney* v. *Ridgard*, with an accurate note of which I have been favored by Mr. Cox, declared his dissent from that case; and declared, he should have given the opposite decision; and yet there was nothing like express fraud; and no motive for it, in order to obtain that assignment; for Mead the younger was not indebted; but was only to give security for what might come to him afterwards as receiver; and he used the mortgage for that purpose. It was indifferent to them, whether they had that or any other security. But Lord Kenyon says, that, if there is either express or implied fraud, the purchaser is bound. In *Whale* v. *Booth*, though that case seems overruled by *Farr* v. *Newman*, stress was laid upon the circumstance, that the testator had been dead three years; and Lord Mansfield says, "If the executors paid all demands, as in that time they might have done, the assets belong to them."

Those three cases for the defendants are in some degree impeached in subsequent decisions. But, supposing they were not impeached, there is nothing in any of them excluding the possibility of the executor having acquired on the execution of the trust, a right to appropriate to himself the assets. But in this instance the assignment was made in less than a month after the death of Mrs. Smith. There is not therefore the least ground for the presumption of right acquired to the assets of Mr. or Mrs. Smith by payments made in that short interval on account of either estate. It is not pretended, it was to satisfy any claim on either estate; for the express purpose appears to have been to secure a debt of his own, which he already owed to the bankers, and other advances they were to make by taking up bills of his, then actually outstanding. They had distinct notice therefore, that the money was not to be applied to any demand upon either estate; but the assets were to be wholly applied to the private purpose of the executor. Allowing every case to remain undisturbed, does it follow from any, that an executor in the first month after the testator's death can apply the assets in payment of his own debt; and that a creditor is perfectly safe in so receiving and applying them, provided he abstains from looking at the will; which would show the existence of unsatisfied demands? I am for the moment keeping out of sight the representation made by Simpson; and supposing the question to be, whether an executor may thus deal

and be dealt with; and it is clear, no rule of justice permits, or of convenience requires, that he should have this unbounded power. Though it may be dangerous at all to restrain the power of purchasing from him, what inconvenience can there be in holding, that the assets, known to be such, should not be applied in any case for the executor's debt, unless the creditor could be first satisfied of his right. It may be essential, that the executor should have the power to sell the assets; but it is not essential, that he should have the power to pay his own creditor; and it is not just, that one man's property should be applied to the payment of another man's debt.

But the question is, not, whether the rule is now to be made more strict, but whether general justice and convenience require it to be relaxed beyond all former precedent. I should hesitate to go so far as other cases have gone: but this would go much farther than any. If the second point in *Scott* v. *Tyler* had received the decision which it was generally supposed would have been given,[1] it would be an authority far beyond what these plaintiffs want; for in that case the executrix had disposed of the River Lee Bonds four years after the death of the testator. The bankers swore, they knew nothing of the will; and they believed the bonds her own property, not that of the testator. If that case had been decided against the bankers, it would have furnished a stronger authority than is necessary for these plaintiffs.

Hitherto I have supposed the executor pretending on other authority than as executor; and that the other defendants relied solely upon his authority in that character. But the truth is, it was not upon his legal authority as executor that they relied: but they proceeded, as they state, upon the faith of his representation; by which they were induced to believe, that the property he assigned to them was actually his own; as the testatrix had left him everything, subject only to £20 a year, and a few small legacies. This representation is partly true, partly false. He was her residuary legatee; and it is taken for granted on all sides, that she had a right to dispose of this property: but he was subject to something more than £20 a year, and some trifling legacies, viz., the claims under her husband's will. This they would have seen, if they had looked at her will, instead of taking his representation. They would have seen, that he had no right to assign the stock, till the claims under that will were satisfied; and that some of those claims were unsatisfied. Common prudence required, that they should look at the will, and not take the debtor's word as to his right under it. If they neglect that, and take the chance of his speaking the truth, they must incur the hazard of his falsehood. The rights of third persons must not be affected by their negligence. I do not impute to them direct fraud: but they acted rashly, incautiously, and without the common attention used in the ordinary course of business; the reference

[1] It has since appeared, that, though that point ended in a compromise, Lord Thurlow had formed his judgment upon it against the bankers. See 2 Dick. 724. — Rep. See *McLeod* v. *Drummond*, 17 Ves. 152, 166 (1810). — Ed.

in the will of Mrs. Smith to the will of her husband making it the same, as if a legatee of her own was disappointed by this. It was gross negligence not to look at the will, under which alone a title could be given to them. It was not necessary to use any exertion to obtain information, but merely not to shut their eyes against the information, which without extraordinary neglect they could not avoid receiving. No transaction with executors can be rendered unsafe by holding, that assets transferred [under] such circumstances may be followed.

For the defendants it is objected, that the plaintiffs were guilty of laches in not taking steps to secure their legacies in the life of Mrs. Smith. But one was an infant, when the bill was filed; and his legacy was not payable till her death; and though the plaintiff Hill might have filed a bill, it was not gross negligence not to do so for so small an object. There was no reason to think the fund was in danger: and upon inquiry she would have found stock sufficient left to answer her legacy. Upon the whole I am of opinion, these funds are liable to answer the plaintiffs' demands.[1]

TAYLOR *v.* HAWKINS.

CHANCERY. 1803.

[*Reported* 8 *Ves.* 209.]

RICHARD HAWKINS, being possessed of certain leasehold premises at Rotton Park, Birmingham, subject to a mortgage to Mary Dalton, by his will, dated the 6th of January, 1790, bequeathed the mortgaged premises and other leasehold estates to his son William Hawkins, to hold to him, his executors, &c., for the residue of the terms, subject to an annuity of £15 to his son Richard Hawkins for twenty years, if he should so long live; and in case his said son should die before the expiration of that term, then to the payment of the said sum of £15 for the remainder of the twenty years to his (the testator's) wife for the use of his children, Sarah, Mary, and George Hawkins; and he appointed his wife and his son William executors.

Richard Hawkins, the testator, died in November, 1792. The executors proved the will. William Hawkins being engaged in trade in partnership with Thomas and John Hawkins became indebted to the plaintiffs as bankers to the amount of £2,000; and in June, 1793, they executed a bond in the penal sum of £3,000; and also by indenture of mortgage, dated the 24th of June, 1793, William Hawkins assigned the premises at Rotton Park to the plaintiffs, subject to the mortgage to Mary Dalton, and to the annuity of £15 under the will of Richard Hawkins, and to a proviso for redemption on payment of £1,500 and interest, and all other sums to be advanced by the plaintiffs.

[1] See, *accord.*, *Wilson* v. *Moore*, 1 Myl. & K. 337 (1834); and see also *McLeod* v. *Drummond*, 17 Ves. 152, 169 (1810).

In October, 1796, William Hawkins and his partners became bankrupts. In March, 1798, by consent of all parties the mortgaged premises were sold for £1,600. Upon that occasion James Reynolds informed the purchaser, that he was a creditor of Richard Hawkins the elder, by a bond, dated the 20th of July, 1784, in the principal sum of £300; and gave notice not to pay his purchase-money.

The bill filed by Taylor and his partners, Taylor being also administrator of Mary Dalton, prayed an account of the personal estate of the testator Richard Hawkins; that the purchaser may pay his purchase-money; and that the purchase-money may be applied in satisfaction of the mortgages; and that the defendant Reynolds may be decreed not to have any lien or claim upon the purchase-money in preference to the plaintiffs.

The defendant Reynolds by his answer insisted upon his bond for money lent; and stated frequent applications to the executors before the bankruptcy. He claimed a balance of £452 8*s.* 10*d.* as due upon the bond, after deducting a sum of £94 1*s.* received from the sale of leasehold premises mortgaged to him as an additional security. He insisted, that the surplus of the purchase-money after satisfying Mrs. Dalton's mortgage ought to be applied in satisfaction of what remains due on his bond in preference to the mortgage to the plaintiffs; especially as such mortgage was executed, not for the purpose of raising any money to discharge the debts of the testator, but only to secure the payment of debts personally incurred by William Hawkins and his partners with the plaintiffs in the course of their trade. He denied all fraud and collusion with Hawkins; and insisted, that he is a *bona fide* creditor; and ought to be paid out of the leasehold premises, as being the assets of Richard Hawkins, in preference to the plaintiff's demand.

Mr. Romilly and *Mr. Cooke*, for the plaintiffs.

Mr. Alexander, for the defendant Reynolds; *Mr. Richards*, for the other defendants.

The Master of the Rolls. [Sir William Grant.] I do not recollect any case, in which the property was specifically bequeathed to the executor: but the person, to whom it has been specifically given, has generally been the party complaining. In this case there is not enough in this answer to ground an inquiry; if not, there is nothing to stand upon. There must be some foundation for an inquiry; as if he had said, he believed, they knew, there were debts unpaid. The decree must therefore be according to the prayer of the bill.[1]

[1] See *Spackman* v. *Timbrell*, 8 Sim. 253, 260 (1837).

LEPARD *v.* VERNON.

CHANCERY. 1813.

[*Reported* 2 *V. & B.* 51.]

WILLIAM VERNON, the younger, having in 1805 contracted to erect buildings, &c., for the Board of Ordnance, and being indebted to Goodacre and Buzzard, his bankers, to the amount of above £8,000, on the 15th of March, 1809, executed to Down & Co. their bankers in London, a power of attorney, enabling them to procure and receive from the Board of Ordnance "all such sum and sums of money as now are, or which may hereafter from time to time become, due and payable" to him. He died on the 16th of June, 1809; and afterwards Down & Co. on the 24th of the same month received the sum of £2,600 and upwards on his account from the Board of Ordnance.

By an assignment, dated the 13th of December, 1809, William Vernon, the elder, as one of the executors of William Vernon the younger, assigned to Goodacre and Buzzard the money then due or to become due to the estate of the testator from the Board of Ordnance, under the before-mentioned contract, in payment of £3,485 12*s.* 3*d.* alleged to be due from the estate of the testator to Goodacre and Buzzard; and also gave them a warrant of attorney of the same date, to confess judgment *de bonis testatoris;* on which they entered up judgment.

Two bills were filed: one by the two executors of Vernon, Jr., who were not parties in that transaction, for an account, &c.; and another by Goodacre and Buzzard; claiming under their assignment, warrant of attorney, and judgment, to receive from the Board of Ordnance what had become due since the last payment; and by their answer to the other bill insisting, that the delivery of the power of attorney by the testator to Down & Co. for the use of Goodacre and Buzzard was equivalent to an assignment of his interest in the money; that they therefore had a power, coupled with an interest; that the money was well received by Down & Co., and they had a right to apply it in liquidation of their demand against the testator's estate. There was parol evidence of declarations by the testator, that the power was given to enable the bankers to apply the money to their debt.

Sir Samuel Romilly, *Mr. Leach*, and *Mr. Wray*, for the two executors, plaintiffs.

Mr. Hart and *Mr. Trower*, for the bankers.

THE MASTER OF THE ROLLS. [SIR WILLIAM GRANT.] The question is, to which of these claimants the money belonged. It is contended, that Goodacre and Buzzard are entitled to retain it; as, though William Vernon died, before it was received, the power of attorney was not revoked by his death; that, being given to them to secure a debt due,

it was not a revocable power. There is no written evidence of the purpose, for which it was given. It is a mere common power, not accompanying any assignment of the debt, nor making part of any security given to the bankers. There is indeed parol evidence, that Vernon had declared, it was to enable them to apply the money to the debt, due to them. But that is not enough to operate as an appropriation of the money, or to prevent it from becoming part of the testator's assets. In the case of *Mitchell* v. *Eades*, Pre. Ch. 125, the power was made irrevocable: yet it was not allowed to be effectual against the general creditors after the death of the debtor.

The other claim was under the assignment by one of the executors, William Vernon, subsequent to the testator's death. It is said, as each of the executors has the power to dispose of the assets, the assignment by one is good. If he had parted with any portion of the property to Goodacre and Buzzard, if by the assignment they had obtained any legal advantage, it could not perhaps be taken from them: but this is a mere assignment of a chose in action by one of several executors, of which no use can be made, unless this court shall act upon it, and interfere to give the particular creditor an advantage against the other executors and the general creditors. That the court will not do; but will direct the money to be paid to the other executor for the benefit of the general creditors. Goodacre and Buzzard have a judgment, it is true; but that does not make them the persons entitled to receive the debt; though it may give them a priority in the administration of assets. It is for the other creditors to consider, whether they should not make application to the court of law, in which the judgment was entered up. Upon the case of *Elwell* v. *Quash*, 1 Str. 20, I conceive, that judgment will be found to be of no avail.

The bill of Goodacre and Buzzard to have the money paid to them must be dismissed with costs as against the Board of Ordnance, and without costs as against the other executors; and upon the bill of the other executors the money must be paid out of court to them.

MILES *v.* DURNFORD.

CHANCERY. 1852.

[*Reported* 2 *De G. M. & G.* 641.]

THIS was on appeal from the decision of *Vice-Chancellor Kindersley*, reported 2 Simons (New Series), 234, where the facts are stated.

The suit was instituted by an executor to set aside a mortgage of a portion of the assets of the testator, made by a Mr. Punter, Jr., his executor. The executor had died, and the plaintiff had taken out administration to him. The ground on which the mortgage was sought

to be set aside was, that it had been made by the plaintiff's co-executor, to secure a debt which had been originally contracted upon his personal security. But the only evidence in support of this charge was the recital in the deed that on the application of Mr. Punter, Jr., the mortgagee had advanced to Mr. Punter, Jr., sums amounting to £600, and that £350 part thereof was advanced to enable Mr. Punter, Jr., as executor, to pay off a mortgage debt charged upon three leasehold houses, part of the testator's estate, and other charges incurred by Mr. Punter, Jr., as executor. The mortgage was for £370, which was recited to be due for principal and interest in respect of the £350.

The Vice-Chancellor dismissed the bill on the ground that the plaintiff having taken upon himself the administration of the estate of his co-executor, by whom the transaction sought to be impeached was entered into, sustained two inconsistent characters, one of which excluded his right to sue.

On the appeal being opened, their Lordships desired to hear the question of pleading argued separately.

Mr. Stuart and *Mr. Nalder*, for the plaintiff.

Mr. Giffard, for the defendant.

The Lord Justice Knight-Bruce. The case is this. One of two executors, being the acting executor, committed, as it is alleged, a breach of trust with respect to the general personal estate, and having done so died, and the surviving executor of the testator, innocent of participation in the breach of trust, made himself administrator of the executor who committed it. I am of opinion that it is competent for him to file a bill to have the transaction, said to be a breach of trust, set aside.

The Lord Justice Lord Cranworth concurred.

Mr. Nalder, for the plaintiff, on the merits.

The Lord Justice Knight-Bruce. On the evidence the security is not in any manner impeached. Assuming that all the evidence that can be, has been adduced, the question is, whether this creates such a case of suspicion as that further inquiry should be directed or allowed. I am of opinion that that proposition cannot be maintained. The only evidence is, that the advances were originally made without security, and that the security was afterwards added. That is a circumstance deserving attention, but it does not go far. It is not inconsistent with probability that the advances were made for a purpose for which the executor might properly borrow as executor. I think that the presumption is in favor of the propriety of the transaction, and that the plaintiff wholly fails.

The Lord Justice Lord Cranworth concurred.

RUSSELL *v.* PLAICE.

CHANCERY. 1854.

[*Reported* 18 *Beav.* 21.]

RICHARD ADAMS TIBBITS died intestate, and Elizabeth Tibbits, his widow, took out letters of administration to his estate, which consisted in part of some leaseholds for years. By indenture dated 29th of September, 1849, the administratrix assigned the leaseholds to Joseph Russell, the plaintiff, by way of mortgage, to secure the sum of £600, but, in case of default in payment of principal and interest, in trust to sell, with power to give receipts and discharges for the purchase-money. Default having been made, the plaintiff, on the 20th of December, 1852, put up the premises for sale by auction, but at the request of John Adams Tibbits, the intestate's son, and of the husbands of the intestate's two daughters, and upon their undertaking, by a memorandum in writing, dated the same day, to pay the amount of principal, interest and costs, due to the plaintiff, on or before the 12th of January, 1853, the sale was not proceeded with. The memorandum contained this proviso, that "if the money be not paid at the time stated, the mortgagee shall be at full liberty to resort to the powers of sale forthwith."

Default having been again made in payment of the money, the plaintiff caused the property to be put up for sale by auction, on the 28th of February, 1853, in two lots, and the defendant, Osborne Plaice, became the purchaser of lot 1. An abstract of title having been delivered to him, he objected that a good title could not be made, on the ground that the administratrix had no authority to create the power or trust for sale contained in the indenture of mortgage, and that the memorandum of the 20th of December, 1852, did not preclude the parties who signed it from objecting to the exercise of such power or trust for sale.

The intestate died, leaving his widow, three sons and two daughters, him surviving. Thomas Adams, one of the sons, died an infant, and Richard Adams, another, bequeathed his share of the property to his mother. John Adams, the third son, and the two daughters, whose husbands signed the memorandum, were, therefore, the sole next of kin of the intestate, and the only persons entitled to dispute the sale.

The defendant having refused to complete, the plaintiff filed his bill for specific performance of the contract.

Mr. Greene, for the plaintiff.

Mr. Shebbeare, contra.

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY] reserved judgment.

THE MASTER OF THE ROLLS. The question in this case is, whether it is so clear, that the power of sale contained in a mortgage by a legal personal representative is good, that this court will compel a purchaser to take a title depending on the validity of such a power?

It is not, nor on principle or authority could it be, disputed, that a sale, a mortgage or a pledge of the property of a deceased person, by his executor or administrator, made *bona fide* for the purpose of administration, is valid; but it is contended, that though an executor can mortgage, he cannot, in such mortgage, give the mortgagee a power to sell, that to do so would be a violation of the principle that *delegatus non potest delegare*. Several authorities were cited and commented upon before me, and especially the case of *M'Leod* v. *Drummond*, 17 Ves. 152, 167, where Lord Eldon enters, at length, into the learning on the subject of the general power of the executor to sell, mortgage and pledge the property of his testator. In that case, Lord Eldon seems to have considered, that if the bill had been filed by residuary legatees or creditors, and within a reasonable time after the deposit had been made, the court would have directed the securities to be delivered up, and in the course of his judgment he observes, "that there is a great difference between directing an instrument to be delivered up, where, upon the circumstances under which it was deposited, that would be too much, and in equity calling upon that person and others to make it effectual." In consequence of this, I thought it proper to reserve my judgment, in order more fully to consider the effect of the cases and the principles involved in them, so far as they are applicable to the case before me. I forbear to cite them in detail, as they are, for the most part, commented upon in the case of *M'Leod* v. *Drummond;* and though many of the points discussed in them bear no relation to the case before me, the principles to be found in them applicable to the question before me are, I think, well laid down by Sir John Leach in the case of *Keane* v. *Robarts*, 4 Madd. 332. It is established by these cases, that a mortgage of the assets of the deceased person, by a legal personal representative, for money advanced at the time by the mortgagee, who is not acting collusively with the executor or administrator, cannot afterwards be called in question, even though the executor or administrator should subsequently apply that money to his own use. Were it otherwise, no one could safely deal with a legal personal representative, and the persons interested in the deceased's estate would be prejudiced by reason of the fetters which would be thus imposed on the executors in their dealing with the assets they are bound to administer.

No question of *devastavit* or improper application arises here; it cannot therefore be disputed, that the mortgage made by the widow, Elizabeth Tibbits, was a valid and effectual mortgage. But the objection is, that though such mortgage may be good, it cannot properly contain a power of sale, for that by giving one, she delegates to another the trust reposed in herself. I am however of opinion, that a little consideration of the distinction existing between the powers intrusted to her and those given to the mortgagee removes this objection. The power which the executors or administrator possesses, of making a valid mortgage, appears to me to include in it a power to give all that is properly incidental to that species of alienation. An executor, who sells

property of his testator, necessarily gives the purchaser a power of selling the property bought, because such a power is incidental to and inseparable from the estate conferred upon him by the conveyance. The power of sale given to a mortgagee must, I think, be considered, not as the delegation of a power intrusted to the executor, which is a power to sell for the benefit of his *cestui que trust*, but as the creation of a new power to sell, not for the benefit of the persons interested in the testator's estate, but for the benefit of the person interested in the mortgage; that is, a power to render the mortgage effectual; and I think that the right to create this power is incidental to the authority of the executor to mortgage. If this were withheld, the persons interested in the assets would be injured, because, in that case, a mortgage could not be effected, unless on terms less advantageous than could be obtained if the person advancing his money obtained the same security as if he was dealing with the absolute owner of the estate. For the purpose of selling the estate of the testator, the executor is considered as the absolute owner, and has all the power incidental to that character. On what principle can it be maintained that he is not to be regarded in the same light and to have the same power, for the purpose of effecting a mortgage, which may be the most beneficial course to be adopted for his *cestui que trust*, and of which benefit the executor is constituted the sole judge?

This view of the case is also confirmed by the consideration, that the executor or administrator may pledge a part of the testator's assets, for the purposes of enabling him better to administer the estate, and that the right of the pledgee to sell the property pledged, if not redeemed within the proper time, is not and cannot be disputed.

I can discover no reason for making the case of a mortgagee the sole exception. I am therefore of opinion, that this sale is good, and that the contract must be specifically performed.

I have preferred deciding this case on the grounds I have stated, as, if confirmed, it will settle the principle on which executors and administrators are to act in such cases, rather than to decide it on facts peculiar to the particular case before me. But I am, in this particular case, confirmed in the view I take, by the circumstance, that all the next of kin of the intestate, except the widow, concur in affirming the validity of this sale, and that the widow herself, as she gave the power to sell, cannot hereafter contest the propriety of its being exercised.

I must, therefore, decree the contract of the 28th of February, 1853, to be specifically performed; and as the title is no longer in question, it must be referred to me in chambers to settle the conveyance, in case the parties differ. I understood at the hearing, that the costs were arranged between the parties; but if not, as this was a question to settle a matter of some doubt, and was properly brought forward to obtain the opinion of the court, I shall give no costs on either side.[1]

[1] See *Vane* v. *Rigden*, L. R. 5 Ch. 663 (1870); *Cruikshank* v. *Duffin*, L. R. 13 Eq. 555 (1872); *Carter* v. *Manufacturers' Bank of Lewiston*, 71 Me. 448 (1880).

WOLVERHAMPTON AND STAFFORDSHIRE BANKING COMPANY *v.* MARSTON.

EXCHEQUER. 1861.

[*Reported* 7 *H.* & *N.* 148.]

IN this case the defendant was executrix of her late husband, who had devised to her the whole of his property, subject to the payment of his debts. The plaintiffs had recovered judgment against the defendant, as such executrix, in an action on a bill of exchange accepted by the testator, and thereupon a writ of *fi. fa. de bonis testatoris* was issued. Upon the sheriff proceeding to levy under the writ, the goods seized were claimed by certain persons under a deed of assignment, executed by the defendant after probate of the will and after judgment, but three days before the execution, whereby she assigned all the property and effects of the testator to the claimants in trust to realize the same and pay the proceeds to his creditors. The sheriff thereupon took out an interpleader summons at chambers, and when the parties attended before the judge, it was agreed that the court should determine their rights without an interpleader issue.

Gray, for the claimants.

Raymond, for the execution creditors.

Andrews appeared for the sheriff.

POLLOCK, C. B. I am of opinion that the assignment of the testator's effects by his executrix to trustees, for the benefit of his creditors, is valid as against the plaintiffs, who are the execution creditors. The case seems to me to fall within the principle of the decision in *Pickstock* v. *Lyster*, 3 M. & Sel. 371, where a debtor, being sued by one of his creditors, pending the suit and before execution assigned all his effects to trustees for the benefit of all his creditors, under which possession was immediately taken; and it was held that the assignment was not fraudulent within the 13 Eliz. *c.* 5, although made with the intent to delay the creditor who sued. It was there said that such an assignment was for the benefit of all the creditors, to procure an equal distribution amongst all of the fund to which all had an equal right, against one who had gained the first step upon them; and the assignment was referred to an act of duty rather than of fraud, arising out of a discharge of the moral duties attached to the character of debtor, to make the fund available for the whole body of creditors. Then, if a debtor may make such an assignment, why may not his personal representative make it? Applying the principle of the decision in *Pickstock* v. *Lyster*, I think that this assignment is valid, notwithstanding its object was to defeat a particular creditor.

MARTIN, B. I entertain no doubt that this assignment is valid, and vested the property in the assignees. An executor may sell and dis-

pose of the testator's effects, or distribute them amongst the body of creditors, — in fact he has as much dominion over them as the testator had when alive.

WILDE, B. I also think that the assignment is valid. Whether or no the executrix committed a *devastavit*, is another question. Upon that I give no opinion.

Order that the claim of the execution creditors be barred.

SMITH *v.* WHITING.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1812.

[*Reported* 9 *Mass.* 334.]

CASE "for that the said Aaron at, &c., on, &c., by his note under his hand of that date, for value received in a debt due to the estate of Ephraim Pollard, deceased, promised John Hartwell and Mary Pollard, executors of the last will of said Ephraim Pollard, to pay them 566 dollars 22 cents in one year from date, with interest; and the said John, who acted as executor as aforesaid, afterwards on, &c., at, &c., by his indorsement on said note, under his hand, for value received, ordered the contents thereof, then due and unpaid, to be paid to the plaintiff; of all which the said Aaron then and there had due notice, and thereupon became liable to pay the same to the plaintiff. Yet though requested," &c.

The defendant demurred generally to the declaration, and the plaintiff joined in demurrer.

Chickering, in support of the demurrer, cited the cases of *Betts* v. *Mitchel*, 10 Mod. 315; *Orde* v. *Fenwick*, 3 East, 104; *Hosier et al.* v. *Lord Arundel*, 3 B. & P. 7.

J. Richardson, for the plaintiff, cited the cases of *Rawlinson* v. *Stone*, 3 Wils. 1, and *King et al.* v. *Thom*, 1 D. & E. 487.

The action stood continued *nisi*, and the next week, in Middlesex,

THE COURT observed that, having looked into the cases cited in the argument, they were satisfied that the defendant must prevail. The question is, whether one of two executors is competent to transfer by indorsement a negotiable promissory note made to the two in their character of executors. The promisees, not being copartners, had each but a moiety. One therefore could not assign the whole. Nor was it competent for him to assign his moiety.

Declaration adjudged bad.[1]

[1] See *De Haven* v. *Williams*, 80 Pa. 480 (1876). *Contra* is *Bogert* v. *Hertell*, 4 Hill, 492 (1842), overruling the Chancellor, who (9 Paige, 52) affirmed the decree of the Vice-Chancellor, 3 Edw. Ch. 20, *sub nom.* *Hertell* v. *Van Buren*.

NOTE. — A lessee taking a reversionary lease from an executor, must show that it was given in the due course of administration. *Keating* v. *Keating*, Lloyd & G. (*temp.* Sugd.) 133 (1835).

A condition in a lease that executors or administrators shall not assign is good. *More's Case*, 2 Cro. El. 26 (1584); *Roe* v. *Harrison*, 2 T. R. 425 (1788). But such a condition does not apply to executors unless they are specially named. *Seers* v. *Hind*, 1 Ves. Jr. 294 (1791).

RETAINER. An executor or administrator, being a creditor of the deceased, may retain goods of the deceased to pay his debt. The leading case on this topic is *Woodward* v. *Darcy*, Plowd. 184 (1558). See also *Loane* v. *Casey*, 2 W. Bl. 965 (1775). So an executor may redeem a testator's goods with his own money, and retain out of the testator's effects the value of what he pays. *Anon.*, Dyer, 2 a (1514). See also *Anon.*, Ib. 187 b (1560).

"As to the right of an executor to outstanding assets, the rules laid down in the books must be taken with some qualification. I cannot accede to the proposition that an executor has a right, in equity, to acquire, as a purchaser, an absolute title to specific chattels, by intending so to deal with them, and by paying the testator's debts to an amount exceeding the value of those chattels. Whatever may be the rule of law upon a plea of *plene administravit*, I apprehend that not to be the rule in equity. I do not agree, that, in equity, the executor has, under such circumstances, an absolute right to the property." — *Per* SIR J. L. KNIGHT-BRUCE, V. C., in *Hearn* v. *Wells*, 1 Coll. 323, 333 (1844).

See also 1 Wms. Exec. (8th ed.) 652–654.

An executor cannot, however, either directly or indirectly, be a purchaser from himself, and he must account in equity for any advantage that he may have received. See 2 Wms. Exec. (8th ed.) 942; 2 Woerner, Amer. Law of Adm. § 334. *Quære*, how far does this apply to specific chattels taken under the right of retainer.

A sale may be made to one who has been appointed executor, but has renounced. See *Mackintosh* v. *Barber*, 1 Bing. 50 (1822).

ASSETS. The property which is chargeable with the payment of the debts and legacies of a deceased person is called assets. Assets are of two kinds, — legal, and equitable. Legal assets are divided into real and personal.

I. LEGAL ASSETS. A. *Real.* Apart from Statute, an ancestor's estates in fee simple were liable in the hands of the heir, but only for debts by specialty in which the heir was named. By St. 3 & 4 Wm. & M. *c.* 14 (1691), the liability was extended to such estates in the hands of devisees. By St. 29 Car. II. *c.* 3, § 12 (1677), a like liability was imposed on estates *pur auter vie* in the hands of the heir as special occupant.

B. *Personal.* All the property and rights which are in the hands of an executor or administrator, in his capacity as representative, are personal assets. As all the testator's goods and chattels, including all surviving *choses in action*, pass to the executor or administrator, they are all legal assets. And if the executor or administrator, in his capacity as representative, has to go into equity to realize an asset, *e. g.*, to collect a legacy, it is none the less a legal asset. *Cook* v. *Gregson*, 3 Drew. 547 (1856).

But no real estate is personal assets, except that by St. 29 Car. II. *c.* 3, § 12, estates *pur auter vie*, where the heir is not named as special occupant, are assets in the hands of the executor or administrator.

II. EQUITABLE ASSETS. The assets of an intestate estate are only legal, but a man may direct by will that his real estate shall go for the payment of his debts generally. Such real estate is equitable assets. The administration of equitable assets is sometimes committed by the testator to his executors, sometimes to third persons.

The distinction in England between the different kinds of assets was important, owing to the different manner in which they were employed in discharge of debts. Speaking roughly, Legal Real Assets were applicable to the payment of specialty debts

only, Legal Personal Assets first to specialty, and afterwards to simple debts; Equitable Assets equally to specialty and simple debts.

In the United States, speaking generally, all a man's property, real and personal, is liable for all his debts. If any debts have precedence, it is without regard to the kind of assets out of which they are paid. The distinction between real and personal, and between legal and equitable assets, if it exists at all, is therefore of slight consequence in this country.

In the rest of this note, by assets will be meant Legal Personal Assets.

On the death of an executor or administrator, the administrator *de bonis non* takes all the assets existing as assets at the death of the original executor or administrator, but he does not take any property which has ceased to be assets.

All the chattels, real and personal, of the deceased, and all his surviving choses in action or claims in equity to money or other personal property are assets.

If any assets have been disposed of by the executor, *e. g.* in paying debts, they cease to be assets.

If the assets have been wrongfully transferred by an executor to one having notice, the administrator *de bonis non* may maintain a bill to have them conveyed to himself. *Cubbidge* v. *Boatwright*, 1 Russ. 549 (1826).

If the executor, in lieu of assets, takes a bond to himself as executor, that is a conversion of the assets to himself; the bond is not assets, and on his death it passes to his own administrator, and not to the administrator *de bonis non*. *Hosier* v. *Arundell*, 3 B. & P. 7 (1802). See *Armitage* v. *Metcalf*, 1 Ch. Cas. 74 (1666); *Miller's Case*, Freem. K. B. 283, 284 (1674). Cf. *Caulkins* v. *Bolton*, 98 N. Y. 511 (1885). But see *Bogert* v. *Hertell*, 4 Hill, 492 (1842).

But a promissory note taken by executors in payment for goods of the testator is, in England, deemed assets. *Partridge* v. *Court*, 5 Price, 412 (1818); affirmed (in Cam. Scacc.) 7 Price, 591 (1819). *Catherwood* v. *Chabaud*, 1 B. & C. 150 (1823).

So if an executor makes an underlease of a leasehold, the reversion remains assets, although perhaps the right to sue for a rent received may be personal to him. See *Turner* v. *Hardey*, 9 M. & W. 770, 773 (1842); *Druce* v. *Baylie*, Freem. K. B. 402 (1675). And although in *Skeffington* v. *Whitehurst*, 3 Y. & C. 1 (1838), it was *held* that the right to redeem a mortgage of leaseholds made by an executor, passed to his representative, and not to the administrator *de bonis non*, this was disapproved on the appeal in the House of Lords. *Skeffington* v. *Budd*, 9 Cl. & F. 219, 248 (1842).

If any of the goods or choses in action have been disposed of or collected by the executor or administrator, the proceeds are assets so long as they remain in the hands of third persons. *Langford* v. *Mahony*, 4 Dr. & W. 81, 107 (1843). And if a note taken by an executor is assets, it would seem that money taken by him would be assets also, whether it be retained in specie, or whether it be deposited with a banker in a separate account. See *Goods of Hall*, 1 Hag. Ecc. 139 (1827).

But the Supreme Court of the United States has *held* that the administrator *de bonis non* cannot recover from an agent of the executor a debt of the deceased collected by such agent. *Wilson* v. *Anick*, 112 U. S. 83 (1884). See *Beall* v. *New Mexico*, 16 Wall. 535 (1872); *U. S.* v. *Walker*, 109 U. S. 258 (1883). And the Supreme Court of Pennsylvania has held that the administrator *de bonis non* cannot demand from a bank the moneys which the original administrator deposited to his account as administrator. *Slaymakers* v. *Farmers' Bank*, 103 Pa. 616 (1883). See *Potts* v. *Smith*, 3 Rawle, 361 (1832).

See also *Yaites* v. *Gough*, Yelv. 33 (1603); *Hirst* v. *Smith*, 7 T. R. 182 (1797).

In many of the United States the powers of administrators *de bonis non* are extended. See 2 Woerner, Amer. Law of Adm. §§ 351, 352.

At common law the claim on a *devastavit* did not survive against the executor or administrator of an executor or administrator, but a remedy was given by Sts. 30 Car. II. *c.* 7 (1678); 4 & 5 Wm. & M. *c.* 24, § 12 (1693). See *Tucke's Case*, 3 Leon. 241, page 646, *post*.

CHAPTER IX.

PAYMENT OF DEBTS.

SECTION I.

SURVIVAL OF CLAIMS.

SWAN *v.* STRANSHAM.

COMMON PLEAS. 1566.

[*Reported Dyer*, 257 *a.*]

TENANT for term of life, remainder over in fee, by indenture demised, granted, and to farm let, for the term of fifteen years fully to be completed, rendering thereout annually during the aforesaid term twenty shillings to the lessor, his heirs, and assigns, without any warranty in the deed, or any express covenant that the lessee should enjoy the term. And within the term the lessor died, and he in the remainder entered upon the lessee, and he brought an action of covenant upon the indenture against the executors of the lessor, and showed the case as above, in the declaration, supposing the covenant broken by the executors, against the form and effect of the indenture aforesaid; and upon this the defendants demurred in law. And in Hilary Term, 9th of the present queen, the case was argued at the bar and bench. And by the opinion of all the Justices the plaintiff shall be barred. And defects were found in the declaration because the plaintiff had not alleged in fact that he was possessed, and afterwards expelled, &c., but by implication. Also the particular estate with the remainder over ought to have been certainly alleged, and not *by implication*, &c. Also the form of the writ should have been *quod teneat conventionem*, &c., *de dampnis et de perditis occasione*, &c. For the matter in law, three of the Justices, *s.* WELSHE, BROWNE, and DYER thought, that the executors should not be charged by this covenant in law, because the covenant in law ends and determines with the estate and interest of the lessee; and if it had been a covenant in fact or expressed, or warranty of the term expressed, it would be otherwise; and no cause of action is given against the testator in his lifetime: and for the argument of this case see the treatises *de Natura Brevium*, and the Register, and M. 4, [E. 3, 57, pl. 71,] and M. 7, E. 3, [65 a, pl. 67,] where the heir shall be charged in covenant, and the Statute of Bigamy [4 E. 1, St. 3, *c.* 6,] *s. dedi et concessi*, and M. 11, H. 6, [East, fol. 41 b,] 6 H. 7, [2 a, pl. 3,] and 2 H. 4, [6 b, pl. 25,] and 42 E. 3, [3, pl. 14,] and 20 [30] E. 3, [6 b, 14 a, b,] in ward, by *The Queen*

Philippa v. *Simkyn Simeon*, and 47 and 48 E. 3, [22 a, pl. 50,] and 22, [1 b, pl. 4,] and 32 H. 6, [52 b, pl. 26, 32 b, pl. 27,] and 26 H. 8, [3 b, pl. 11.] And afterwards, in Hilary Term, it was again argued at the bench. And for the matter in law Weston was of opinion against the three other Justices, because the lease was by indenture, which is matter of conclusion and estoppel; but if it were by deed poll, he agreed with his companions. And *quære* what difference, &c. But Browne put this case. A man seised in fee-simple made such a lease by indenture for years as above without express covenant, and died, and his heir in and by descent ousted the termor, he shall have an action of covenant against the heir for the privity, &c. And so the assignee of the termor shall have against the lessor if he be ousted by him without express words of warranty or assignment, *quære* thereof, and see the Statute 32 H. 8, *c.* 34. And afterwards, in Easter Term following, judgment was given against the plaintiff in the principal case before. The same case in effect was so ruled in Trinity, 22d of the present queen, between *Broderidge* and *Windsore;* and a demurrer to the declaration, because no express covenant or warranty of the term was comprised in the indenture, but a naked covenant in law.[1]

WHITEACRES *v.* ONSLEY.

1573.

[*Reported Dyer*, 322 *a.*]

Debt by Whiteacres and others, executors of Warde, against Onsley and Tirril, executors of R. T., late warden of the Fleet, and count upon a recovery in debt by the testator against one Thurland, in C. B. for which he was in execution in the Fleet, whence the testator of the defendants, being warden there, suffered him to escape, the debt not satisfied to the plaintiff; whereby an action accrued, &c., against the said warden in his lifetime, and since his death against his executors. And note, the words of the escape which charge the warden, are "that the aforesaid T. by default of the said warden, escaped at large; the aforesaid plaintiffs not satisfied of the debt and damages aforesaid, &c." And the defendants demurred upon the count; and the opinion of the court was, that such action does not lie against the executors for the escape, unless the warden himself in his lifetime was convicted and adjudged of the escape; for the offence is only a trespass by negligence. And see the Statute of 1 R. 2, *c.* 12, accordingly for such escape out of the Fleet: for at the common law no writ of debt lies as

[1] Followed by *Adams* v. *Gibney*, 6 Bing. 656 (1830). And as to what is an express covenant as distinguished from a covenant in law, see *Williams* v. *Burrell*, 1 C. B. 402 (1845).

it seems, but an action on the case. And by Ingleby, 41 Li. Ass. [15], an action for such escape does not lie against the executors of the warden. And H. 10 of the present queen [*ante* fol. 271 a, pl. 25] such an action against the heir of the warden does not lie by the opinion of the court.

TUCKE'S CASE.

Exchequer. 1590.

[*Reported* 3 *Leon.* 241.]

In this case, it was holden by all the Barons clearly, that the executor of an executor should not be charged with a *devastavit* made by the executor of the first testator, no not in the case of the king, because it is a personal wrong only.[1]

PERKINSON *v.* GILFORD.

King's Bench. 1639.

[*Reported Cro. Car.* 539.]

Debt against Gilford and others, executors of William Collier, Esq., late sheriff of the county of Dorset, for two and twenty pounds ten shillings. Whereas the plaintiff had recovered in the Common Pleas against the executor of William Pawlett a debt of one hundred pounds, and two and twenty pounds ten shillings for damages, the debt and damages *de bonis testatoris si, &c.; et si non*, the said two and twenty pounds ten shillings *de bonis propriis:* and the record being removed into this court, the plaintiff had a *fieri facias* directed to the said William Collier, sheriff of Dorset, for the levying of the said two and twenty pounds ten shillings damages of the goods of the said executor: and by virtue thereof he levied the said two and twenty pounds ten shillings, and afterwards died without paying, &c.: whereupon he demanded it of the said executors, and they had not paid it, *per quod actio accrevit.* The defendants pleaded *non debet;* and found against them.

Mallet moved in arrest of judgment,

First, because the recovery of the said debt of £122 10*s.* is in the Common Pleas, and the execution by *fieri facias* is in the King's Bench,

[1] "Although by the common law, when the executor wastes, his executor shall not be liable, because it is a personal wrong, it is otherwise here, and the common law will come to it at last."—*Per* Lord Finch, C., in *Price* v. *Morgan*, 2 Ch. Cas. 215, 217 (1676). A remedy at law was given by Sts. 30 Car. II. *c.* 7 (1678); 4 & 5 Wm. & M. *c.* 24, § 12 (1693).

and he doth not show how he came out of the Common Pleas into this court to have execution. *Sed non allocatur:* for in the record it is mentioned that it is here duly, which shall be intended to be by a writ of error, or other due means: and it is not necessary to show all the circumstances how it came hither.

The second objection, because it doth not appear that upon the *fieri facias* awarded it was ever returned served here, so as there is no record to charge him; for if there were any record appearing that he had levied it, then peradventure he might charge the sheriff.

The third objection, because he chargeth him in action of debt, whereas there was never any such action brought before; but (if it had appeared by the record that the money was levied) he might have had accompt, or action upon the case, or a *scire facias*, but never an action of debt.

The fourth objection, that although the action lies against the sheriff himself, yet it lies not against his executors; for the non-payment is a personal wrong, wherewith his executors are not chargeable, as debt upon an escape lies not against a sheriff's executors.

But Berkley, Jones, and Myself (Brampston being absent) agreed, that the action well lies: for to the second and third objections the *fieri facias* being duly executed, and the money levied by the sheriff, the executor of Pawlett the defendant in the first action is discharged, and may aver and plead it against any new execution to be awarded against him, as 21 Hen. 8, fol. , proves; and the sheriff is chargeable for the money to him who recovered it: and as it is allowed that he might be chargeable in accompt, as *Mallet* said, so it is agreed he may be chargeable in debt; for the plaintiff might have either debt or accompt, as appears in 28 Hen. 8 and 4 Co. 94 a, *Slade's Case*. And as, Berkley said, the case is in the Year-Book, 1 Hen. 7, that a collector by acceptance of a tally is chargeable in debt, so the sheriff, having levied the money, is chargeable for so much in debt to him who recovered. And *Mallet* confessed, that in the Common Pleas it was adjudged, where the sheriff returned a *fieri feci*, debt lieth against him. And Berkley said, it was all one when he receives the money, for he is then liable, although he returns not the writ; for his not returning shall not aid nor excuse him. And for the fourth objection they held, that the sheriff's executors are as well chargeable as himself: for, as Jones said, there is a diversity where the sheriff is chargeable in his life for a personal tort or misfeasance; there his person is only chargeable, and there *actio moritur cum persona:* but where he is chargeable for levying of money, and not paying it over, that is for a duty; and there, if he dies, his executors are chargeable as well as himself; which is the reason, that for an escape by the sheriff his executors are not chargeable: but there would be great mischief if the sheriff's executors should not be alive in this case; for the plaintiff had a duty due to him from the executors of Pawlett the first defendant, who paid it to the sheriff, and thereby was dis-

charged thereof: and if the plaintiff should not recover it against the sheriff's executors, he should be without remedy, which the law will not suffer. — Wherefore they all agreed, that the action well lay. And rule was given to have judgment entered, unless, &c.

HAMBLY *v.* TROTT.

King's Bench. 1776.

[*Reported Cowp.* 371.]

Lord Mansfield.[1] This was an action of trover against an administrator, with the will annexed. The *trover* and *conversion* were both charged to have been committed by the testator in his lifetime: the plea pleaded was, that the *testator* was *Not guilty*. A verdict was found for the plaintiffs, and a motion has been made in arrest of judgment, because this is a *tort*, for which an executor or administrator is not liable to answer.

The maxim, *Actio personalis moritur cum persona*, upon which the objection is founded, not being generally true, and much less universally so, leaves the law undefined as to the kind of personal actions which die with the person, or survive against the executor.

An action of trover being in *form* a *fiction*, and in *substance* founded on *property*, for the equitable purpose of recovering the value of the plaintiff's specific property, used and enjoyed by the defendant; if no other action could be brought against the executor, it seems unjust and inconvenient, that the testator's assets should not be liable for the value of what belonged to another man, which the testator had reaped the benefit of.

We therefore thought the matter well deserved consideration. We have carefully looked into all the cases upon the subject. To state and go through them all would be tedious, and tend rather to confound than elucidate. Upon the whole, I think these conclusions may be drawn from them.

First, as to actions which survive against an executor, or die with the person, on account of the *cause* of *action*. *Secondly*, as to actions which survive against an executor, or die with the person, on account of the *form* of *action*.

As to the *first;* where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labor, or property of another, or a promise of the testator express or implied; where these are the causes of action, the action survives against the executor. But where the cause of action is a *tort*, or arises *ex delicto* (as is said in Sir T. Raym. 57, *Hole* v. *Blandford*), supposed to be *by force* and *against the king's peace*, there the action

[1] Only the opinion is here given.

dies; as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a watercourse, escape against the sheriff, and many other cases of the like kind.

Secondly, as to those which survive or die, in respect of the *form of action*. In some actions the defendant could have waged his law; and therefore, no action in that form lies against an executor. But now, other actions are substituted in their room upon the very same cause, which do survive and lie against the executor. — No action where in form the declaration must be *quare vi et armis, et contra pacem*, or where the plea must be, as in this case, that the *testator* was *not guilty*, can lie against the *executor*. Upon the face of the record, the cause of action arises *ex delicto;* and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender.

But in most, if not in all the cases, where trover lies against the testator, another action might be brought against the executor, which would answer the purpose. — An action on the custom of the realm against a common carrier, is for a *tort* and supposed crime: The plea is *Not guilty;* therefore, it will not lie against an executor. But *assumpsit*, which is another action for the same cause, will lie. — So if a man take a horse from another, and bring him back again; an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor.

There is a case in Sir Thomas Raymond, 71 (*Bailey* v. *Birtles et uxor, executrix of Richard Baily*), which sets this matter in a clear light: There, in an action upon the case, the plaintiff declared, "that he was possessed of a *cow*, which he *delivered* to the testator, Richard Bailey, in his lifetime, to *keep* the same for the use of him the *plaintiff;* which cow the said Richard afterwards *sold*, and did *convert* and dispose of *the money to his own use;* and that neither the said Richard, in his life, nor the defendant after his death, ever paid the said money." Upon this state of the case, no one can doubt but the *executor* was liable for the *value*. But the special injury charged, obliged him to plead, that the *testator* was *not guilty*. The jury found him guilty. It was moved in arrest of judgment, because this is a *tort* for which the executor is not liable to answer, but *moritur cum persona*. For the plaintiff it was insisted, that though an executor is not chargeable for a *mis-feasance*, yet for a *non-feasance* he is: as for non-payment of money levied upon a *fieri facias*, and cited Cro. Car. 539; 9 Co. 50 b; where this very difference was agreed; for non-feasance shall never be *vi et armis*, nor *contra pacem:* But notwithstanding this the court held "it was a *tort*, and that the executor ought not to be chargeable." Sir Thomas Raymond adds, "*vide* Saville, 40, a difference taken." That was the case of *Sir Henry Sherrington*, who had cut down trees upon the queen's land, and converted them to his own use in his lifetime. Upon an information against his widow, after his decease, Manwood, Justice, said, "In every case where any price or value is set

upon the thing in which the offence is committed, if the defendant dies, his executor shall be chargeable; but where the action is for damages only, in satisfaction of the injury done, there his executor shall not be liable." These are the words Sir Thomas Raymond refers to.

Here therefore is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c., there, the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall.[1]

So far as the tort itself goes, an executor shall not be liable; and therefore it is, that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable; and his executor therefore shall be charged.

There are express authorities, that trover and conversion does not lie against the executor: I mean, where the conversion is by the testator. Sir William Jones, 173–4; Palmer, 330. There is no saying that it does.

The form of the plea is decisive, viz., that the *testator* was *not guilty;* and the issue is to try the guilt of the testator. And no mischief is done; for so far as the cause of action does not arise *ex delicto*, or *ex maleficio* of the testator, but is founded in a duty, which the testator owes the plaintiff; upon principles of civil obligation, another form of action may be brought, as an *action for money had and received.* Therefore, we are all of opinion that the judgment must be arrested.

PER CURIAM. *Judgment arrested.*

Mr. Buller, for the plaintiff.

Mr. Kerby, for the defendant.

FINLAY *v.* CHIRNEY.

COURT OF APPEAL. 1888.

[*Reported* 20 *Q. B. Div.* 494.]

APPEAL of defendants from the judgment of the Queen's Bench Division (*Field* and *Wills*, JJ.) ordering a new trial.

The defendants were the executors of one G. B. Chirney, and were sued in respect of a breach of promise of marriage committed by their testator during his life. The plaintiff, a widow, was housekeeper to

[1] See, accordingly, *Powell* v. *Rees*, 7 A. & E. 427 (1837); *Bishop of Winchester* v. *Knight*, 1 P. Wms. 406 (1718).

the testator, and was seduced by him under a promise of marriage, a child being born in August, 1884; in April, 1886, Chirney died. At the trial at Newcastle-upon-Tyne before *Cave*, J., the plaintiff was nonsuited upon the ground that there was no corroboration of the promise, no other point being then taken by the defendants. The plaintiff moved before the Divisional Court to set aside the nonsuit, when the objection was taken on behalf of the defendants that an action for breach of promise of marriage would not lie against the executors of a deceased promisor; but no judgment was given upon this point, the court being of opinion that the proper course was to send the case down for a new trial. The defendants appealed.

The pleadings contained no allegation that the plaintiff had suffered any special damage by reason of the breach of promise, but the Divisional Court gave leave to the plaintiff to amend the statement of claim in that respect, and to deliver particulars of the special damage to the defendants. By special leave of the Court of Appeal these particulars, verified by an affidavit of the plaintiff, were used during the argument before their Lordships. It is unnecessary to set out the particulars at length in this report; they fell under the following heads: (1.) Amount expended by plaintiff in preparation for marriage in the purchase of underclothing and of other material for clothing; (2.) Maintenance of the plaintiff from the date of the promise to the death of the testator; (3.) Costs occasioned by the birth of the child, including costs of its maintenance until the testator's death; (4.) Loss of a parish allowance for each of her three legitimate sons until they attained the age of sixteen, withdrawn before they attained that age in consequence of the birth of the illegitimate child; (5.) Loss, owing to the birth of the child, of a legacy of £100, which would otherwise have been left to her by her mother in common with her brothers and sisters.

Waddy, Q. C., and *H. F. Boyd* (*Ernest Pollock* with them), for the appellants.

Digby Seymour, Q. C., and *J. Lawson Walton*, for the respondent.

Lord Esher, M. R. This was an action brought against the executors of a deceased man in respect of a breach of promise of marriage; it was tried before Cave, J., and evidence as to the facts was gone into, and the only objection raised by the defendants at the trial was, not that such an action would not lie, but that there was no corroboration of the alleged promise. The plaintiff was nonsuited, and she then went to the divisional court; there, besides the contention as to want of corroboration, the further point was taken by the defendants that the action would not lie; this was decided in favor of the defendants, and upon the case as it was presented to them the Divisional Court might have entered judgment for the defendants, but upon the suggestion that special damage might be laid and proved they granted a new trial, giving leave to the plaintiff to amend by adding allegations of special damage. An appeal is now brought to us, and three questions present

themselves for our consideration: first, whether the action will lie without special damage; secondly, whether it will lie with special damage; and thirdly, whether, if special damage be proved, the action will lie only for the amount of such special damage, or whether it will lie for all the damages ordinarily given in actions for breach of promise of marriage; all these three formulas are of great importance.

Upon the first question I entertain no doubt whatever; the authority of English law is overwhelming to the effect that no action for breach of promise of marriage can be brought by executors or will lie against them. The authority for this proposition consists in the fact that in the case of *Chamberlain* v. *Williamson*, 2 M. & S. 408, it was decided that such an action would not lie, at least at the suit of an administrator, and in the additional fact that there is no case to be found in the books where such an action has been maintained either by executors as plaintiffs or against them as defendants, and this in spite of the fact that circumstances must frequently have arisen which would invite a decision of the question. And besides authority there is the principle expressed in the maxim, *Actio personalis moritur cum persona.* Is an action for breach of promise of marriage a personal action, in the sense that the cause of action or complaint or injury is one affecting solely the person both of the promisor and promisee? It is clear that it is not a complaint of anything affecting property, whether personal or real; it is an injury: that is, it is a cause of action purely personal on both sides, personal both to the person to whom and the person by whom the promise is made. It is true that in the old days an action for breach of promise of marriage was in form an action founded on contract, and that even now it is still treated as an action for breach of contract. Formerly an action of tort was almost inevitably a personal action; but it did not follow necessarily that an action was not personal because it was founded on a breach of contract. The complaint in an action for breach of promise of marriage is indeed a complaint of a breach of contract, but the injury is treated as entirely personal, and not only are damages always given in respect of the personal injury to the plaintiff, but also damages arising from and occasioned by the personal conduct of the defendant; and evidence of the conduct of both parties is allowed to be given in mitigation or aggravation. The ages of the respective parties may be taken into account, as well as their whole behavior; and the damages may be much enlarged if the conduct of the defendant has been an aggravation of the breach of his promise. A consideration of these facts goes to show that an action for breach of promise of marriage is strictly personal, and that, although in form it is an action for breach of contract, it is really an action for a breach arising from the personal conduct of the defendant and affecting the personality of the plaintiff.

Of course it is said, and said justly, that the damages recovered in the action affect the property of the respective parties; but that is not the proper test to apply; the true test is whether the cause of action

itself is one which affects property. The question is therefore concluded both upon principle and by authority. The same has been held to be the law in America, and all the American cases to which I have been able to obtain access are clear upon the point. I am therefore of opinion that the action as brought, there being no allegation of special damage, was wrongly brought, and that judgment was properly given, though upon a wrong ground, for the defendants at the trial.

But in the only English case on the subject, that of *Chamberlain* v. *Williamson*, there is an exception suggested to this rule which is expressed in the words, "except there be special damage," and on looking at the American cases I find that they say the same thing. I know, however, of no case in which special damage has been laid and the action has been maintained, and there is no authority to enable us to decide how such a case should be dealt with. Indeed I have grave doubts whether it would not be the wisest course to say that even with special damage the action will not lie, but I am not prepared upon the authorities to go that length. I can hardly conceive of a case where such special damage could arise as would support the action; but, assuming there were such damage, is its existence to open the whole case against the executors and make them liable, not only for the special damage resulting from the breach by their testator, but for all the damages which could be recovered in such an action against a living person? Does the action against the executors become an action for breach of promise of marriage, with all the ordinary consequences of such an action, because of the existence of special damage to the plaintiff, or does it lie only for the amount of the special damage? If we were to say that in such a case the whole matter was open for consideration, we should in effect be doing away with the principle that a personal action dies with the person affected by it, and that by reason of the personal nature of the cause of action the executors are not liable; we should have to say that they would be liable in an action for personal injury, which is nothing but a personal action, and this would break both the rule and the principle. I entertain no doubt whatever that, even if the action will lie upon proof of special damage, it must be confined to a claim for the special damage only, and that a claim for general damages, which would be recoverable from the defendant in his lifetime, must be struck out. Therefore the damage to be considered must be a damage affecting the property of the plaintiff, and for that only can the action be brought.

What is the kind of special damage that can exist under such circumstances? I think it can only exist in cases where the plaintiff can show that, besides the promise to marry, there was at the time of the making of the contract another promise affecting the personal property of the one party or the other. Such a promise, if made and proved, would be one of the considerations, or part of the consideration, for the promise of the other party, and there would be one promise moving upon two considerations or upon one complicated consideration. If

such an express promise could be proved, it might be sued upon as part of the consideration for the plaintiff's promise; and even though there were no such express promise, yet if circumstances were proved to exist showing that both the parties contemplated that a breach must affect the property of one or the other, an action might be brought; that is to say, if the case were within the rule laid down in *Hadley* v. *Baxendale*, 9 Ex. 341, an action would lie in respect of a damage to property or a loss of money through the breach.

I think, therefore, that this action will not lie without special damage, and that if special damage be proved it will not lie for anything that is not special damage. If there be special damage, an action will lie for it, and the cause of action will still be for breach of promise of marriage, but the action will lie only for that special damage, whether the damage arises by reason of an express promise which was part of the contract to marry, or whether circumstances existed at the time of the contract which show that such special damage was then within the contemplation of the parties; and it seems that the American cases point to a like state of the law in that country.

The plaintiff therefore was rightly nonsuited at the trial, although upon a wrong ground; she had then upon the pleadings no cause of action, but the Divisional Court granted her the indulgence of a new trial, and gave her leave to amend her statement of claim by inserting an allegation of special damage. In mercy to both the suitors we have thought it right to look carefully into that question, and we gave leave to the plaintiff to say what was the special damage alleged, and particulars have been delivered to us. In my opinion they disclose nothing that can be called special damage within the meaning of the rule that I have enunciated. It is suggested that the plaintiff had bought her trousseau, but it cannot be said that in all cases of a contract of marriage the lady is justified in at once providing herself with clothes in anticipation of the fulfilment of the contract; in the present case, the plaintiff being in the position of a housekeeper to a farmer, it scarcely seems a reasonable thing to have done. Even in higher ranks of life the same remark would apply: the man who is going to be married has nothing to do with the bride's trousseau, which is provided by her father; if a breach of the promise is committed, the lady still has the clothes, and I cannot think this a good specimen of special damage; besides, such a fact has always been allowed to be given in evidence as an aggravating circumstance, and it is in my opinion not special damage. Then it is also said by the plaintiff that she had given up a better place, and if at the time of the contract to marry, the plaintiff had agreed to give it up at once or before the wedding-day, it might be special damage, as being part of the consideration for the promise to marry; but it must be brought to the knowledge of the other party at the time of the contract in order to bring it within the principle in *Hadley* v. *Baxendale;* if the agreement to give up the place were made after the contract to marry, it would be no part of the promise.

There is one other point which remains to be noticed. It is said that the promise to marry was made as part of an invitation to seduction, and that a child was subsequently born. That would, indeed, be a matter existing at the time of the contract and forming part of the negotiations between the parties, but it would not be special damage, for such a contract would be contrary to public policy, morality and decency, and such a claim could never be allowed. The special damage recoverable in such an action as this must, as I have said, be something affecting the money value of the contract to the plaintiff, and there is no such class of special damage in the particulars. If the whole of these particulars were inserted in the statement of claim, the same result ought to follow; there would be no case for the plaintiff, and the defendants ought to have judgment. I think, therefore, that we ought to go beyond the Divisional Court, and say that there shall be no new trial, and that judgment shall be entered for the defendants. The defendants should have the costs of the trial, and there should be no costs to either side in the Divisional Court or before us.

BOWEN, L. J. The judgment which I am about to read is that of my Brother FRY and myself.

That there was in this case some evidence which, if the jury believed it, would be in corroboration of the plaintiff's own story, we do not doubt, for the reasons indicated during the course of the argument. But a more serious question has been raised as to the liability of an executor in respect of an alleged breach of promise of marriage by the testator whose estate he represents.

The liability of an executor in respect of the acts and defaults of his testator has been in the English law a matter of slow growth. The maxim, *Actio personalis moritur cum persona*, is one of some antiquity, but its origin is obscure and post-classical. Unless, indeed, some very restricted sense is affixed to the word *personalis*, it is by no means true at the present day that a personal action always dies with the person. Upon the other hand, if the meaning of the maxim is to be limited, it is difficult to reconcile its phraseology with the ordinary classifications of ancient English law. Judges and text-writers since the reign of Queen Elizabeth have been in the habit of explaining upon fit occasions that only actions *ex delicto* were within the operation of the principle. "The rule," says the learned editor of Williams' Saunders (1 Wms. Saund. 210), "was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any other duty to be performed." This remark is true, if confined to the law of recent times, but it is inexact if it be taken as applying to the older English law under which actions based upon an obligation as a rule died with the person. As applied, however, to modern times, the proposition is supported by abundance of authority. "*Actio personalis*," says Willes, C. J., in *Sollers* v. *Lawrence*, Willes, 413, at p. 421, "is always understood of a tort," and similar expressions occur

elsewhere in plenty. But though this gloss or limitation has been forced upon the Latin maxim in later times by the exigencies of a growing society, we are left still in the dark as to the maxim's exact meaning or source. The truth is, that in the earliest times of English law, survival of causes of action was the rare exception, non-survival was the rule. Moreover, the clear line which we are accustomed at this day to draw between contract and tort in the classification of personal actions does not correspond with the early English law, nor with the history of old English writs and causes of action. Actions of trespass were formerly actions of a quasi-penal character, and based upon the supposition of personal wrong. It was not unnatural that such actions should die upon the death of the trespasser. "All private criminal injuries or wrongs, as well as all public crimes, are buried," says Lord Mansfield, in *Hambly* v. *Trott*, 1 Cowp. 375, "with the offender." But survival was also denied to other actions which did not fall within this category. In Bracton's time the general law was, that an obligation was got rid of by the death of either of the contracting parties, Bracton, fol. 101: "Item tollitur morte alterius contrahentium, vel utriusque, maxime si fuerit pœnalis, vel simplex — si autem duplex, scilicet pœnalis et rei persecutoria, in hoc quod pœnalis est tollitur, et non extenditur contra hæredes, nec datur hæredibus, quia pœna tenet suos auctores, et extinguitur cum persona." In debt the executor could not be sued where the testator could have waged his law, see *Pinchon's Case*, 9 Rep. 88 a; a condition of things which continued even down to 1805: *Barry* v. *Robinson*, 1 New Rep. (B. & P.) 293. And when we consider that all actions on the case (as is said by Blackstone, J., in *Mast* v. *Goodson* (2 W. Bl. 848, at p. 850, decided in 13 Geo. 3), were originally for torts, and that it was only in the time of Queen Elizabeth that the familiar action of assumpsit was after a controversy introduced, it becomes plain that it is within the last three centuries that the contractual liabilities of an executor have expanded to their present limits.

Modern jurisprudence has, however, since the reign of Queen Elizabeth adopted a rough but convenient interpretation of the maxim, which is set forth in the passage above cited from Williams' Saunders. On the one side of the line of demarcation lie actions of tort. Remedies for wrongful acts, according to the present law, can only be pursued against the estate of a deceased person when property or the proceeds or value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys; *Phillips* v. *Homfray*, 24 Ch. D. 439, at p. 454. On the other side of the line lie actions founded on any contract express or implied "or any other duty to be performed." Early in the reign of James an action was allowed against executors for payment of a debt, if clothed in the form of an action on the case in assumpsit: *Pinchon's Case*, 9 Rep. 89 b; and this remedial view of the law has been adopted and followed ever since.

The question we have to decide to-day relates to a class of action which, though in its form and substance contractual, differs from other forms of actions *ex contractu* in permitting damages to be given as for a wrong. This double aspect of an action for breach of promise creates the perplexity in the present instance. On which side of the line is to fall an action which is based on the hypothesis of a broken contract, yet is attended with some of the special consequences of a personal wrong, and in which damages may be given of a vindictive and uncertain kind, not merely to repay the plaintiff for temporal loss, but to punish the defendant in an exemplary manner? How far is such an action within, how far without, the maxim *Actio personalis moritur cum persona?* The problem is one which in the nature of things is of later date than the Year-Books. Before the Reformation no action for breach of promise could be maintained, for marriage was a matter of spiritual jurisdiction. It was not till the middle of the seventeenth century that marriage was recognized by our law as a temporal benefit, and a breach of promise of marriage as cognizable by the temporal courts: *Baker* v. *Smith*, Styles, 295; see also Rolle's Abridgment, Tit. Action on the Case, fol. 22, par. 20; *Hebden* v. *Rutter*, Sid. 180; and *Harrison* v. *Cage*, Carthew, 467, a case supposed erroneously by Willes, J., in *Smith* v. *Woodfine*, 1 C. B. N. S. 667, to be the earliest recorded case of an action for breach of promise of marriage. No authorities of a very early date can accordingly be expected to throw light upon the question, and it must be solved mainly upon principle.

It is a striking and not an immaterial fact that no action for breach of promise of marriage against the executors of a deceased person is to be found in the books. We have, moreover, a case decided by Lord Ellenborough and the Court of King's Bench towards the beginning of the century which affords us some guidance in the matter. In *Chamberlain* v. *Williamson*, the converse of the present case occurred in an action brought by the representative of a deceased against a living person for breach of promise. It was held that an action of the sort, in which no special damage was alleged, would not lie, on the ground that, except when such special damage had been occasioned, the action was in reality an action arising out of a personal injury. "The general rule of law," says Lord Ellenborough (2 M. & S. at p. 415), "is, *Actio personalis moritur cum persona*, under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate." This judgment has been adopted as a guiding one by the American courts in the cases of *Stebbins* v. *Palmer*, 1 Pickering (Mass.) 71; *Lattimore* v. *Simmons*, 13 Sergeant & Rawle (Penn.) 183; *Smith* v. *Sherman*, 4 Cushing (Mass.) 408, at p. 413; and *Hovey* v. *Page*, 55 Maine, 142. It does not, indeed, follow that the same reasoning applies *in toto* to

actions brought against the executors of a deceased person: see *per* Bramwell, L. J., in *Twycross* v. *Grant*, 4 C. P. D. 40.

But the decision in *Chamberlain* v. *Williamson* shows, at all events, that the courts of this country will, even although an action for breach of promise be an action arising out of contract, apply the general principles of the maxim *Actio personalis* to so much of the damages as are a remedy for mere personal wrong, and will allow so much of the remedy to survive as seems to belong to the ordinary category of actions *ex contractu*. In order accurately to draw the dividing line, it becomes necessary to analyse the damages which are recoverable in cases of breach of promise, and their measure and character has nowhere been better explained than in Sedgwick on Damages, vol. ii. p. 146, in a passage cited with approval by Willes, J., in *Smith* v. *Woodfine*, 1 C. B. N. S. 660, at p. 667. "This action," says the learned author, "is given as an indemnity to the injured party for the loss she has sustained, and has been always held to embrace the injury to the feelings, affections, and wounded pride, as well as the loss of marriage. From the nature of the case it has been found impossible to fix the amount of compensation by any precise rule, and, as in tort, the measure of damages is a question for the sound discretion of the jury in each particular instance, subject, of course, to the general restriction that a verdict influenced by prejudice, passion, or corruption will not be allowed to stand. Beyond this the power of the court is limited, as in cases of tort, almost exclusively to questions arising on the admissibility of evidence, when offered by way of enhancing or mitigating damages." It is, as it seems to us, by way of enhancing damages, and not as a special head of damage flowing naturally from the breach, that evidence of the means of the defendant is usually given at the trial. If it were otherwise, such head of damage would require special averment on the record. But it is treated as part of the history of the circumstances of the case, and as enabling the jury to estimate properly the conduct of the defendant. "The value of the defendant's property," says Cresswell, J., in *Smith* v. *Woodfine*, 1 C. B. N. S. at p. 666, "is invariably gone into in cases of this sort." But where there is no special averment on the record of pecuniary loss arising out of the breach, the general allegation of the breach of promise imports, according to Lord Ellenborough, only a personal injury: *Chamberlain* v. *Williamson;* though the jury may consider such personal injury with reference to all the circumstances of the case.

There may, of course, be an actual loss to the temporal estate of the promisee, arising out of the breach of contract. If such loss is to be relied on as independent and special damage in an action against executors, it ought to be specially pleaded, and in order to see if such damage is in fact recoverable the ordinary line as to remoteness of damages will have to be drawn according to the well-known doctrine of *Hadley* v. *Baxendale*.

If the above is a correct account of the damages recoverable in an

action for breach of promise, it would seem to follow that with the death of the promisor all claim to damages of an exemplary or sentimental kind ought to cease, and that such damages only ought to be left as represent compensation for a temporal and measurable loss, flowing directly from the breach or within the contemplation of both parties at the date of the promise, and that in an action against executors such a temporal loss, if it is alleged, must be tested according to the ordinary rules as to remoteness as applied to the special facts of the case. In the present action there is no special averment of temporal loss, and we ought not to allow the pleadings at this late stage to be amended, and to send down the case to trial again, unless we are satisfied that there is a substantial claim under this head fit for the consideration of the jury. By special leave of the court, the plaintiff has now filed an affidavit as to particulars of special damage. The only items which are entitled even to plausible consideration are two: first, the expense to which the plaintiff was put in maintaining herself as a *feme sole* subsequently to the breach; and, secondly, the amount expended by the plaintiff in the purchase of underclothing, &c., in preparation for her marriage. The plaintiff's expense in maintaining herself after she was forsaken clearly cannot be recovered. It cannot be a consequence naturally arising out of a breach of promise of marriage that the woman is to be entitled during the remainder of her life to charge the expenses of her living and maintenance to her faithless lover. With respect to the claim for underclothing, &c., it is sufficient to say that the materials furnished by the plaintiff's affidavit do not show that such purchase was made under circumstances which would bring the expenditure within the head of damages flowing directly from the alleged breach of contract, or within the contemplation of the parties at the time. We do not desire to intimate any opinion that expenditure in respect of a marriage trousseau or other marriage preparation must necessarily be too remote to be recovered against executors in an action for breach of promise of marriage — the matter must in each case depend upon the circumstances of the case — but though invited to do so, the plaintiff has not given us the means of seeing that this particular head of damage can be sustained by evidence, or what case she has for asking for an amendment to be made in the statement of claim which would include it. The action, therefore, must be dismissed, with costs; but as the only point taken by the defendants at the trial was one as to corroboration, and as that point was a bad one, we think that there ought to be no costs of the hearing of the Divisional Court or of this appeal.

Judgment for the defendants.[1]

[1] See *Wade* v. *Kalbfleisch*, 58 N. Y. 282 (1874); *Price* v. *Price*, 75 N. Y. 244 (1878).

JENKINS *v.* FRENCH.

SUPREME COURT OF NEW HAMPSHIRE. 1879.

[*Reported* 58 *N. H.* 532.]

ASSUMPSIT. The question reserved was, whether this action could be maintained against the administrators for unskilful treatment of the plaintiff by the deceased.

A. F. L. Norris, for the plaintiff.

Mugridge, for the defendants.

STANLEY, J. The precise point here presented has been decided in *Vittum* v. *Gilman*, 48 N. H. 416, and we find no good reason to doubt the correctness of that decision.

It is conceded that if the action were in tort it could not be maintained; but the plaintiff claims that, being in contract, a different rule prevails.

The general doctrine, to which this case forms no exception, is, that actions for the redress of personal injuries only do not survive, and this without regard to the form. It is true, as a general proposition, that actions in form *ex contractu* survive, but this is due rather to the substance of the action than to its form. There are actions, such as arise from the negligence of an attorney, or of a coach proprietor, where the plaintiff seeks to recover damages, which survive, but in these the primary cause of complaint is the injury to property and rights of property, and the personal injury is incidental. The line of demarcation, separating those actions which survive from those which do not, is, that in the first the wrong complained of affects primarily and principally property and property rights, and the injuries to the person are merely incidental, while in the latter the injury complained of is to the person, and the property and rights of property affected are incidental. This distinction is recognized in all the authorities. Broom Max. 702; Com. Dig. "Administration," B. 15; *Hambly* v. *Trott*, Cowp. 375; *Chamberlain* v. *Williamson*, 2 M. & S. 408; *Stebbins* v. *Palmer*, 1 Pick. 71; *Smith* v. *Sherman*, 4 Cush. 408; *Wade* v. *Kalbfleisch*, 58 N. Y. 282, 285, 287; *Lattimore* v. *Simmons*, 13 S. & R. 183; Chitty Pl. 67, 90; Bouv. Inst. 2755, 2756.

In the present case, there is no suggestion of injury to the property or property rights of the plaintiff. Her only complaint is of her personal injuries by the unskilfulness of the deceased, and the action cannot be maintained.

Case discharged.

FOSTER, J., did not sit: the others concurred.[1]

[1] See *Boor* v. *Lowrey*, 103 Ind. 468 (1885).

SECTION II.

PRIORITY OF PAYMENT.

Note. — The order of paying out the assets is, at common law, as follows: 1. Funeral expenses. 2. Expenses of probate and administration. 3. Debts due to the Crown by record or specialty. 4. Judgments in courts of record. 5. Recognizances. 6. Specialty debts and rent. 7. Simple debts, *semble*, to the Crown. 8. Simple debts. 9. Voluntary bonds. See 2 Wms. Exec. (8th ed.) 992–1030.

In the United States the priority of payments has been altered by Statute. The following order is perhaps the most usual: 1. Funeral expenses and expenses of last sickness. 2. Expenses of administration. 3. Debts due to the United States. 4. Debts due to the State. 5. All other debts; in a few States judgments have precedence. The priority of specialty debts has been almost entirely done away with. See 2 Woerner, Amer. Law of Adm. §§ 364–374.

Funeral Expenses. As to the extent and amount of funeral expenses, see 2 Wms. Exec. (8th ed.) 972–976; 2 Woerner, Amer. Law of Adm. §§ 357–360.

Although the executor has not ordered the funeral expenses, he is liable for them, if reasonable, to the amount of the assets. The action is against him personally. *Tugwell* v. *Heyman*, 3 Camp. 298 (1812); *Rogers* v. *Price*, 3 Y. & J. 28 (1829); *Corner* v. *Shew*, 3 M. & W. 350, 355, 356 (1838). See *Green* v. *Salmon*, 8 A. & E. 348 (1838); *Ferrin* v. *Myrick*, 41 N. Y. 315 (1869); 2 Wms. Exec. (8th ed.) 1794–1798. In Massachusetts, the suit is against the executor in his representative capacity. *Hapgood* v. *Houghton*, 10 Pick. 154 (1830). See *Trueman* v. *Tilden*, 6 N. H. 201 (1833).

ANONYMOUS.

Common Pleas. 1537.

[*Reported Dyer*, 32 *a*, *pl.* 2.]

In debt against an executor who pleaded *plene administravit* it was given in evidence at the trial by the defendant, that he had paid divers debts upon contracts made by his testator; upon which the plaintiff demurred in law. And now *Mountague* demanded judgment for the plaintiff. And the judges thought there was no reason for delaying it, inasmuch as he was not compellable to pay such debts. And admit that the creditors had bonds for them, yet inasmuch as the defendant had not said that he paid these debts *before that writ purchased* (for if he paid them pending the writ, that is not a good administration to bar the plaintiff, by Baldwin [C. J.]), they agreed that the judgment should be entered, and that it should be only *de bonis testatoris*, no more than if it were found by verdict. *Quod nota.*

HARRISON'S CASE.

COMMON PLEAS. 1598.

[*Reported* 5 *Co.* 28 *b.*]

ROBERT GREEN brought an action of debt on a bond of £40 against William Harrison administrator of the goods and chattels of Thomas Sidney: the defendant pleaded, that the intestate was bound in a bond in the nature of a Statute staple, beyond which he had no goods, &c. The plaintiff replied, that there were indentures of defeasance made to perform covenants in certain indentures, which were all performed hitherto; upon which the defendant demurred. And it was adjudged that the plaintiff should recover; for a debt due by bond shall be paid before a Statute made to perform covenants, when none of them then were, nor perhaps ever would be broken, but are things in contingency, and *in futuro;* and therefore such possibility which peradventure may never happen, shall not bar present and due debts by bond or other specialties. And if such Statutes to perform covenants should bar others of their due debts, little or no debts would be paid. *Et nota bene*, that it was adjudged in the King's Bench by POPHAM, Chief Justice, and the whole court, Hil. 42 Eliz. that if a man recovers debt by judgment in the king's court, this judgment shall be paid before bonds in the nature of a Statute staple or merchant; for judgment given in the king's court is higher than such Statutes which are "private records, and portable by the conusee in his pocket." But judgments given in the king's court on ordinary and judicial proceedings, which remain in the custody of a sworn officer, are records which are preferred in law before such Statutes. And the law presumes, *quod judicium redditur in invitum;* and such judgments shall be paid before recognizances acknowledged by the assent of the parties in any of the king's courts, which may be acknowledged in a private manner; and it is not material whether the judgment or recognizance, or Statute be first; but be the judgment first or last, it ought to be first satisfied. And so it was held by the whole Court of Common Pleas, between *Pemberton and Bartram*, Pasch. 32 Eliz. Rot. 235 (Swinb. 369, 4 Co. 59 b), which see before in the end of the *Sadlers' Case*, in the fourth part of my Reports.[1]

[1] See, *accord.*, *Read* v. *Blunt*, 5 Sim. 567 (1832); *Collins* v. *Crouch*, 13 Q. B. D. 542 (1849).

LITTLETON *v.* HIBBINS.

COMMON PLEAS. 1600.

[*Reported Cro. El.* 793.]

SCIRE FACIAS against executors, upon a judgment against their testator in debt. They pleaded, that before they had any conusance of this judgment, they had fully administered all their testator's goods in paying of debts upon obligations. — And it was thereupon demurred: and, after argument at the bar, adjudged for the plaintiff, that it was not any plea; for they at their peril ought to take conusance of debts upon record, and ought first of all (unless for debts due to the queen, wherein she hath a prerogative) to satisfy them; and although the recovery was in another county than where the testator and executors inhabited, it is not material. But if an action be brought against them in another county than where they inhabit, and before their knowing thereof they pay debts upon specialties, that is allowable. Wherefore it was adjudged accordingly. *Vide* 4 Hen. 6, *pl.* 8. 21 Edw. 4, *pl.* 21.

BLUNDIVELL *v.* LOVERDELL.

COMMON PLEAS. 1661.

[*Reported* 1 *Sid.* 21.]

IN debt on a bond against an administrator, he pleads that two judgments have been had against him by *non sum informatus*, one of £20 and the other of £50, beyond which he has no assets, which judgments remain in force; and that he had no notice of the plaintiff's original (which was of earlier date). The plaintiff replies that the defendant did stir up and procure the plaintiffs in these judgments to sue him, and that the judgments were had by covin. The defendant traversed the covin, and on this the plaintiff demurred. And on the second day judgment was given against the plaintiff.

1. It was resolved that the traverse was good, for it is the covin that is material and avoids lawful acts. 1 Inst. 35 a. The case of the dower assigned by the disseisor by covin. *Tresham's Case*, 9 Co. 110 b; 3 Co. 78. And administration by covin is void. Dyer, 399. And the knowledge of the date of the first original is not material nor traversable, no more than the *sciens canem ad mordendum oves consuetum*, 28 Hen. VI. 7; nor is the stirring up or procurement material. But the CHIEF JUSTICE [SIR ORLANDO BRIDGEMAN] said that these things are good evidence, and so he said the case of debt against an executor

by *Green against Michelworth* is to be understood, which was Hil. 37 & 38 El. Ro. 183, in B. R.

2. It was resolved that the defendant here might well confess and satisfy these judgments and not the plaintiff. And as to that the case is, that the executor procures one to sue him for a just debt on a bond, and judgment is had on that. And this judgment is pleaded in bar by the executor to an action begun before that time, which PER CURIAM he may well do. And the Chief Justice said that there is a difference between covin and consent, and that appears by the last case in 5 Hen. 7; abridged in Br. tit. False Recovery, 40. *Vide librum* (for I do not warrant this collection of Brooke). And it seems, by Doct. & Stud., lib. 2, cap. 11, fo. 79 et 80, that an executor has liberty in such a case to satisfy one before another, notwithstanding notice. And this in good conscience, for in good conscience they can pay one before another, and although in good conscience all ought to be paid, yet in point of fact there may be more reason to satisfy one debt than another, as if one lends money without usury, and another with usury; or one creditor be poor &c. So that the stirring up is not material. But otherwise will it be if it is to deceive and defraud, and so to bar the plaintiff by practice of the executor. 8 Co. 133 in *Turner's Case*, 21 Hen. 7. Kelw. 74. 2 Cro. 8, 9. 7 El. Dyer, 272. 9 Edw. IV. 12. But the executor, according to these books, can plead dilatorily.

Note that it was agreed that the "stirring up," &c., and the covin were good evidence as before with regard to the first point.[1]

BRITTON *v.* BATTHURST.

COMMON PLEAS. 1683.

[*Reported* 3 *Lev.* 113.]

SCIRE FACIAS against the defendant, as administrator of Mary Sachwell, against whom the plaintiff had obtained a judgment for £1,700 Mich. 30 Car. 2, and £5 damages, as administratrix to Henry Sachwell her husband, *de bonis prædict'* Henry Sachwell, *si tant'*, *&c. & si non tant'*, *&c. de bonis suis propriis;* and suggests, that Mary had goods sufficient from Henry, but that she had wasted them. The defendant pleaded that Mary had fully administered the goods of Henry, and traverses the *devastavit;* and *quoad* the £5 *pro damnis*, pleads payment to the plaintiff by Mary Sachwell. The plaintiff, *quoad* the first plea, maintains the waste, and issue thereupon; and as to the £5 pleads *non solvit*, and issue thereupon also. As to the last issue, the jury found for the plaintiff, that Mary did not pay the £5. And as to the first issue for £314 11*s.* 5*d.* that Mary wasted. And farther they find, that before the marriage between Henry and Mary,

[1] See *Prince* v. *Nicholson*, 5 Taunt. 665 (1814).

scil. May 2, 23 Car. 2, Henry covenanted with Henry Norwood to leave Mary at his death £1,000 and entered into an obligation of £2,000 to the said Norwood to pay accordingly: That after the marriage Henry died, indebted to the plaintiff the said £1,700 for money had and received, and that administration of his goods was committed to Mary, and after, *scil.* 23 Octob. 30 Car. 2, the plaintiff sued Mary for the £1,700 and obtained the judgment aforesaid. And that the £1,000 not being paid to Mary, Norwood *eodem* Oct. 23, brought debt upon the bond against Mary, as administratrix to her husband, and recovered a judgment against her for £2,000 upon the bond, *de bonis Hen. si tant'* &c., and that Mary by consent of Norwood had £1,000 left in her hands of the goods of Henry to satisfy the £1,000 due to him. *Sed utrum illa devastavit præd'* £1,000 *necne petunt advisamentum curiæ.* And farther they find, that after judgment to the plaintiff other goods of Henry, to the value of £63 came to her hands, which she paid in satisfaction of debts of Henry due upon obligations. *Et utrum* she hath also wasted the £63 *petunt advisamentum curiæ.* And upon argument it was resolved by the whole Court, that the defendant must be charged *de bonis* of Mary for the £1,000 left to her for her own use; for she by confessing judgment to the plaintiff hath made herself liable; because she might have pleaded the obligation of £2,000 in bar of the £1,700 being only due upon contract to the plaintiff, which having omitted, she shall be charged therewith notwithstanding the other judgment for her proper debt, as if an administrator hath assets to the value of £100 only, and confess two several judgments to two several persons for £100 each, he shall be obliged to pay both, as if he had bound himself in two several obligations to pay them so much money. 2. By Pemberton, Wyndham and Charlton, it not being found that at the time of the judgment confessed, she the administratrix had notice of the obligations upon which she paid the £63 she shall not be charged for the said £63 nor shall her payment be a *devastavit* in her; for they held, that if an executor pays debts upon contracts, when there are debts by specialty unpaid, but he had no notice of them, his payment of the simple contract debts shall be no *devastavit* for want of notice that there are debts of a higher nature. Levinz *totis viribus contra* in this point. He agreed that where executors pay debts of equal nature, after action commenced against them for another debt of the same degree, want of notice of the writ shall excuse them. But after an action once commenced against them for a debt of a superior nature, they cannot pay debts of a lower nature; and whether they have notice, or not notice, is not material. Nor was it ever seen, that want of notice of specialties shall excuse the payment of debts upon simple contract by an executor. But the other three judges being of opinion, *ut supra*, gave judgment accordingly. But Charlton told me afterwards, that he had changed his opinion as to this point.[1]

[1] See *Davies* v. *Monkhouse*, Fitzg. 76 (1729).

GOATE *v.* FRYER.

CHANCERY. 1789.

[*Reported* 2 *Cox*, 201.]

THE plaintiff Dorothea Goate was the administratrix of her late husband, Alexander Goate, who died in December, 1788, intestate, indebted to several persons, and amongst others to Thomas Wood by simple contract. In Trinity Term last Thomas Wood filed his bill in this court on behalf of himself and all other the creditors of the said Alexander Goate who should come in and contribute to the expense of that suit, against the present plaintiff Dorothea Goate, for a general account of the intestate's personal estate possessed by her, and a distribution thereof ratably amongst his creditors. To this bill she put in an answer, and submitted to account. The cause was heard on the 30th June, when a decree was made for taking the account, advertising for creditors, and a distribution amongst those who should come in ratably and in proportion to their debts. In Easter Term last, before the filing of Wood's bill, the present defendant, James Fryer, brought an action at law against the plaintiff as administratrix of her husband for goods sold and delivered, to which she pleaded *plene administravit* on the 30th June, being the date of the decree, and immediately afterwards filed this bill, stating the former suit and decree made therein, and praying to be protected thereby, and an injunction to restrain the defendant Fryer from proceeding in his action at law. At a seal after last term the common order for an injunction was obtained for want of an answer. In this term he put in his answer, admitting personal notice of the former decree, but insisting that he had a right to proceed at law, and he gave notice of trial in the action.

Harvey, for plaintiff, now moved that the injunction might be extended to stay trial of the action; and in support of the motion contended that the administration of the whole personal estate being by the decree in the first cause taken into the hands of the court, it would not permit any creditor to take any part of it by an execution at law; that a decree of this court was equal to a judgment at law, and the court would support its own decrees accordingly; that as it was clear the court would never permit the defendant to take out execution, it would give him no advantage to obtain a judgment now, for all the creditors who came in under the decree already made would have a priority in point of time to the defendant's judgment at law. He cited *Martin* v. *Martin*, 1 Vez. 211. *Kenyon* v. *Worthington*, July, 1786.

For defendant it was admitted that the court would not permit him to take out execution, but it was contended he ought to be at liberty to proceed to judgment, as then he would be a creditor for his costs as well as his debt.

Lord Chancellor [Thurlow]. It is now the settled rule of the court not to permit any creditor to proceed at law against an executor or administrator after a decree to account and for payment of all debts; for that gives every creditor who carries in a claim equal to that of a creditor by judgment at law from the date of the decree. The court does not take away from a creditor the benefit of such a judgment, if prior to the decree; but it only supports the decree as equal in point of rank to a judgment, and then follows the rule of law in giving preference to the prior debt in point of time. Therefore let the injunction extend to stay trial; but as the defendant's action at law was commenced before the first bill was filed, let the defendant be at liberty, if he shall discontinue his action at law, to prove the costs of the action as a debt under the decree.[1]

MALTBY *v.* RUSSELL.

Chancery. 1825.

[*Reported* 2 *S. & St.* 227.]

This was a creditors' suit. The decree directed the Master to take the usual accounts.

The personal representatives had, subsequently to the filing of the bill, paid several of the testator's debts, one of which was due to a firm in which one of them was a partner. The Master having refused to allow them the sums they had paid in discharge of those debts, they took exceptions to his report.

The exceptions now came on to be argued.

Mr. Sugden, *Mr. Simpkinson*, and *Mr. Girdlestone, jun.*, in support of the exceptions.

Mr. Rose and *Mr. Pemberton*, for the devisees of the real estate.

Mr. Horne and *Mr. Lovatt*, for the plaintiffs.

The Vice-Chancellor on the argument, expressed a strong opinion in favor of the Master's report, and doubted the correctness of Colles's report of the case of *Lord Orford* v. *Darston*, Colles, P. C. 229. His Honor, however, took time to consider of the case, and afterwards delivered judgment to the following effect.

The Vice-Chancellor. [Sir John Leach]. That an executor should be permitted, after a bill filed for the administration of the assets here, to prefer one creditor to another, breaks in upon the ruling principle, that equality is equity. Even at law, an executor cannot, after an action brought, prefer one creditor to another, unless judgment is first obtained against him; which is founded upon the principle of greater legal diligence. He is indeed permitted to confess such judgment (which breaks in upon the principle of greater legal diligence), because it is said that

[1] See *Drewry* v. *Thacker*, 3 Swanst. 529 (1819).

he is not bound to charge his testator's estate with costs, by defending the action where he knows the debt to be due.

I find, however, that the case of *Darston* v. *Lord Orford*, in the House of Lords, is correctly reported; and in *Waring* v. *Danvers*, 1 P. W. 295, it is expressly referred to as establishing the point that a creditor may give a preference after a suit instituted.

I am bound therefore by this authority to allow the exceptions in this case.[1]

[1] See 2 Wms. Exec. (8th ed.) 1041, 1042.

CHAPTER X.

LEGACIES.

SECTION I.

LAPSED AND VOID LEGACIES AND DEVISES.

NOTE. — In this section are cases concerning lapsed and void devises as well as legacies.

WRIGHT *v.* HALL.

COMMON PLEAS. 1716.

[*Reported Fort.* 182.]

THE case ss. The testator devised all that his messuage and tenement in Edmonton to Francis Carter and his heirs, and all the rest and residue of his messuages, lands, tenements and hereditaments in Edmonton, Enfield, and elsewhere, to John Lammas, his heirs and assigns forever.

After the making this will, the aforesaid Francis Carter, the devisee, died in the lifetime of the testator, so that this became a lapsed devise by his death; and then the sole question in ejectment was, Whether this latter clause of the will would carry over the lapsed devise to John Lammas, the residuary devisee, or whether it should descend to the heir at law of the testator?

It was admitted, that such a residuary clause would carry over a lapsed legacy to a residuary legatee from an executor; but the doubt was, whether it would carry it from the heir at law.

Those who argued that it would not, cited many authorities in the books, where 't is expressly adjudged, that an heir at law shall not be disinherited, but by very plain and clear words, or by some necessary implication from express words, which show, that the testator did intend to disinherit him.

The court held, that the devise of all the rest and residue of my messuages, lands, &c. did not convey what was expressly devised before: for wills must be construed from the intent of the testator at the time of making the will, which appears to be to give his whole estate to Carter and his heirs, in that messuage; and at the time of the will made, he had no rest and residue left in that house, and the devise to Carter being void, the house will go to the heir at law, and not to John Lammas.

This was the authority and foundation of another case which was of the same nature; viz. that the *rest and residue of my lands undevised* must be meant at the time of making the will; and this was the case of *Roe and Fludd*, Pasch. 2 Geo. 2. [Fort. 184.][1]

BAGWELL *v.* DRY.

CHANCERY. 1721.

[*Reported* 1 *P. Wms.* 700.]

J. S. INTER AL' bequeathed the surplus of his personal estate unto four persons equally to be divided between them share and share alike, and made A. B. his executor in trust. One of the four residuary legatees died in the life of the testator, after which the testator died; and the question being, to whom the fourth part devised to the residuary legatee (who died in the life of the testator) should belong?

THE LORD CHANCELLOR [MACCLESFIELD], after time taken to consider of it, did this day deliver his opinion, that the testator having devised his *residuum* in fourths, and one of the residuary legatees dying in his lifetime, the devise of that fourth part became void, and was as so much of the testator's estate undisposed of by the will; that it could not go to the surviving residuary legatees, because each of them had but a fourth devised to them in common, and the death of the fourth residuary legatee could not avail them, as it would have done, had they been all joint legatees, for then the share of the legatee dying in the life of the testator, would have gone to the survivors. But here the *residuum* being devised in common, it was the same as if a fourth part had been devised to each of the four, which could not be increased by the death of any of them.

His Lordship further declared, that this share could not go to the executor, he being but a bare executor in trust, and consequently, that it must belong to the testator's next of kin, according to the Statute of Distribution, as so much of the personal estate remaining undisposed of by the will, and that as to this, the executor was a trustee for such next of kin.[2]

[1] See *Doe* d. *Morris* v. *Underdown*, Willes, 293 (1741).

[2] Expenses of administration of personal estate come out of the residue generally, and not primarily out of a lapsed share alone. *Trethewy* v. *Helyar*, 4 Ch. D. 53 (1876). See *In re Jones*, 10 Ch. D. 40 (1878). Cf. *Scott* v. *Cumberland*, L. R. 18 Eq. 578 (1874); *Hurst* v. *Hurst*, 28 Ch. D. 159 (1884).

VINER *v.* FRANCIS.

CHANCERY. 1789.

[*Reported* 2 *Cox*, 190.]

JOHN WIGGINGTON by will gave to his brother Samuel Wiggington £6,000 in trust *for the use and benefit of his children*, to be equally divided between them, either in his lifetime or at his death, when, and in such manner as he should judge most convenient and beneficial to them. He gave to his sister Martha Selby £3,000, the interest of which he gave to her for her own use during her life; and at her death he desired the principal might devolve to her son Miles Selby, unless she should have more children, and then the same sum to be shared equally between them. He then added, "*Item*, I give unto the *children of my late sister Mary Crowser*, the sum of £2,000 to be equally divided among them. Note, To the above three legacies I desire £100 may be paid to each within one month after my decease, to buy mourning, &c." And after giving several other legacies, he gave the residue, after payment of debts and legacies, thus: "I give unto my brother Samuel Wiggington one third of the residue, and one third more to my sister Martha Selby, and the other third I give to the children of my late sister Mary Crowser, equally to be divided between the children of my brother Samuel Wiggington, my sister Martha Selby, and the children of my late sister Mary Crowser."

At the date of the will there were three children of Mary Crowser living, viz. John, Elizabeth, and William. William died *after the date of the will*, in *the lifetime of the testator*; and it was contended that one third of one third of the £2,000 given to the children of Mary Crowser lapsed into residue, and that one third of the residue lapsed, and was payable to the next of kin, as undisposed of.

MASTER OF THE ROLLS. [SIR RICHARD PEPPER ARDEN.] There is no doubt in this case on the bequest to the children of Samuel Wiggington, for all his children were living at the death of the testator. It was once indeed thought that a bequest to "the children of A." might extend to *all* children born at any future time; but *Derisme* v. *Mello*, 1 Brown. Cha. Rep. 537, has settled that such children shall take, as are born at the time the distribution of the fund is to take place. The doubt in this case arises on the clause which gives "to the children of my late sister Mary Crowser" the sum of £2,000 to be equally divided. As I said before, the general rule as settled by *Derisme* v. *Mello* is, that the children *living at the time of the distribution of the fund*, shall take; if it is to be distributed at the time of the testator's death, then such children as shall be *then* living; if distributable at the death of some *other* person, then the testator is to be supposed to mean such children as shall be living at the time of the

death of such other person. Then the question is, whether a gift to the children of *his late sister* Mary Crowser is or is not indicative of an intention different from that which would be imputed to him under the general rule, that is, whether he meant the *particular* children living at the time he made his will, to take the fund equally between them, or whether it was not the same thing as if he had given the £2,000 "to the *three* children of my late sister;" for in that case it would have been a legacy to three *personæ designatæ*. Now when a testator gives a fund to be divided amongst his own children, he shall be supposed to mean such children as shall be living at the time of his death. If so, why should I suppose that the *sister being dead*, he meant anything else than what would be imputed to him in the other case? This is not like the case of *Lord Bindon* v. *Earl of Suffolk*, 1 P. W. 96, for there the gift is to the *five* grandchildren, which shows that he had *particular* objects in view. But the general rule, I take it, comes to this, to *exclude* all children, who, although living at the date of the will, yet die before the testator, and to include all those who are living at the time of the distribution, although born after the will or the death of the testator.[1]

LLOYD *v.* LLOYD.

CHANCERY. 1841.

[*Reported* 4 *Beav.* 231.]

THE testatrix gave all her residuary personal estate, after payment thereout of all her just debts, legacies, and expenses attending thereon, upon trust to divide the residue thereof into three equal parts or shares; and as to one equal third part of such residue, upon trust to pay or transfer the same unto her son John Lloyd, his executors, administrators, or assigns, for his and their own use and benefit. And as to one other equal third part thereof, upon trust that they, her said trustees, &c., should, within the space of six calendar months next after her decease, pay unto her son Charles Lloyd the sum of £500, part thereof, to and for his own sole and absolute use and benefit; *and as to the residue and remainder of such last-mentioned one third part*, upon trust for Charles Lloyd for life, with remainder to his children; and as to the remaining one third part of such residue of her estate, she gave the same to her daughter Charlotte Hodgkinson for life, with remainder to her children.

Charles Lloyd died in the lifetime of the testatrix, leaving children, and the question was to whom the £500 belonged.

[1] See *Dimond* v. *Bostock*, L. R. 10 Ch. 358 (1875); *Re Allen*, 44 L. T. N. S. 240 (1881); *Jackson* v. *Roberts*, 14 Gray, 546 (1860); *Schaffer* v. *Kettell*, 14 All. 528 (1867). Cf. *Dowset* v. *Sweet*, Ambl. 175 (1753).

Mr. Pemberton and *Mr. K. Parker* for the plaintiffs, the children of Charles Lloyd.

Mr. Rogers, contra.

Mr. Tennant, for the children of Charlotte Hodgkinson.

The Master of the Rolls. [Lord Langdale.] In this case of *Lloyd* v. *Lloyd*, I have looked over the case of *Skrymsher* v. *Northcote*, 1 Swan. 566, and I confess that I am not able to find that there is any substantial difference between that case and the present.

In that case the testator gave to each of his daughters a life interest in his residuary estate, with remainder to their children; making, in the event of there being children, an absolute severance of the fund. And he directed, that if either of the daughters died without children, £500 should be paid, out of the moiety of the residue given to her and her children, to H. N.; and the remainder of that moiety was to go over to the other sister, subject to the same limitations. The testator revoked the gift of the £500, and the event on which it had been given having happened, the question was, whether it was to go to the other residuary legatee, or to the next of kin; and Sir Thomas Plumer considered, that although where a legacy failed, it inured to the benefit of the residuary legatee, yet "that a part of a residue, of which the disposition failed, would not accrue in augmentation of the remaining portion as a residue of a residue, but, instead of resuming the nature of residue, devolved as undisposed of;" and in that case he determined that the £500 must go to the next of kin. He considered that there was a subdivision made of that moiety of the residue, and that the sum given out of it was a portion of the residue, which neither went to the other residuary legatee, nor to any other person, but had lapsed for the benefit of the next of kin.

In this case the testatrix has given her residue, and directed it to be divided into three equal portions. One portion she gave to one person absolutely. As to the second portion, she gave £500 out of it to the father of the children who were intended to have the remainder after his death; and then she gave the remainder of the third part of the residue to the father for his life, with remainder to his children; and the other third she gave to another branch of the family.

The question in this case is, what is to become of the £500, the gift of which has failed by the death of the legatee in the lifetime of the testatrix. I am satisfied that if she had contemplated the event which happened, namely, the death of that person in her lifetime, she would have given the whole of the share of the residue to his children, in the way she had given the remainder. But looking at the decision in the case before Sir Thomas Plumer, that there is a difference between a legacy and a legacy given out of a share of the residue, I must consider the £500 as a portion of the one third share of the residue, and as a mere subdivision of it, and that it belongs to the next of kin as undisposed of.[1]

[1] See *Green* v. *Pertwee*, 5 Hare, 249 (1846); *Beekman* v. *Bonsor*, 23 N. Y. 298, 312 (1861).

GREENE *v.* DENNIS.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1826.

[*Reported* 6 *Conn.* 292.]

EJECTMENT[1] for land in Pomfret. Trial before *Bristol*, J.

The plaintiffs claimed title as heirs of Sylvester Wickes; the defendant claimed under a lease from the Yearly Meeting of the people called Quakers, and also under a lease from Rowland Greene. The defendant put in evidence the will of said Wickes, dated in 1822. By this will the testator devised the *locus* to the Yearly Meeting of the people called Quakers, of New England, and after numerous other devises and bequests, he disposed of the residue thus: "Also I give to my said nephew Rowland Greene, all the rest and residue of my estate, of what kind or nature it may be, or wherever found, not herein or otherwise disposed of, on condition that he, the said Rowland, pay, or cause to be paid, all my just debts, the foregoing legacies, funeral charges, and the expense of settling my estate."

The judge ruled that if the devise to the Yearly Meeting was void, the land descended to the heir; the jury returned a verdict for the plaintiffs, and the defendant moved for a new trial on the ground of a misdirection.

Cleaveland and *Johnson*, in support of the motion.

Goddard and *H. Strong*, contra.

HOSMER, C. J. [gave the opinion of the court. It was *held* that the members of the Yearly Meeting could not take and hold the land as individuals; that the Yearly Meeting was not a corporation; and that therefore the devise was void. The opinion continued thus:] It remains for consideration, the devise in question to the Yearly Meeting being void, whether the lands demanded, descended to the heirs-at-law of devisor, or were transferred to the residuary devisee.

In relation to real estate, it is an established principle, that in case of a lapsed devise, the estate does not vest in the residuary devisee, but descends to the heir-at-law of the testator. Wills must be construed by the intent of the devisor, at *the time of making them*. Of consequence, when property is given to a person incapable of taking, and there is a general devise of the residue; so far as respects the estate specifically devised, at the time of the will's being made, there is an intentional disposition; and it never was designed, that it should fall into the *residuum*. The law respecting the bequest of personal estate, is different; but as to the realty, the decisions have been uniform and unquestioned. *Wright* v. *Hall*, Fortes. 82; *Roe* v. *Fludd*, Fortes. 182; *Doe d. Morris et al.* v. *Underdown*, Willes, 293; *Watson et al.* v. *Earl of Lincoln et al.*, Amb. 338, 9; *Attorney-General*

[1] The following statement is substituted for that in the report.

v. *Johnstone*, Amb. 580; *Gravenor* v. *Hallum*, Amb. 643, 645, 2 Madd. Ch. 81. The case of *Crane* v. *Crane*, 2 Root, 487, scarcely requires being mentioned, by way of exception, as it was little discussed, and without the citation of any authority.

The other judges were of the same opininion.

New trial not to be granted.[1]

DOE d. FERGUSON *v.* HEDGES.

SUPERIOR COURT OF DELAWARE. 1835.

[*Reported* 1 *Harring.* 524.]

CLAYTON, C. J.[2] Mary James being seised in fee of the premises in question by her will duly executed, dated 30th July, 1831, gave and devised to "Saint Andrew's Church in Wilmington, all a certain lot of land therein described, to have and to hold the use of the said house and lot to the said church forever; but not to be sold on any account whatever." And after bequeathing sundry legacies, there is this clause in her will: "Item, I give, bequeath and devise to William Ball and Mary Ball, children of James Ball, deceased; and to John McKnight all the residue of my estate real and personal of whatever kind it may be." The lessors of the plaintiff are the residuary devisees.

It is not contended in this case that the devise to Saint Andrew's Church, passes any estate in the premises in question to the church; but it is admitted that the devise is void by the laws of this State. That question was decided at the last May Term in Kent, in the *State, Use of Wiltbank et al.* v. *Bates*. The question here is, who take? the heirs-at-law of Mrs. James, or her residuary devisees?

Since the case of *Doe on the demise of Morris* v. *Underdown*, Willes, 293, that question seems to be completely settled in England. In that case the distinction, as far as we can ascertain, was first established between a lapsed devise, and a void devise. The principles laid down by the Chief Justice in that case were these: that the intent of the testator ought always to be taken as things stood at the making of his will, and is not to be collected from subsequent accidents which the testator could not then foresee; and that when a testator in his will has given away all his estate and interest in certain lands, so that if he were to die *immediately* nothing remains undisposed of, he cannot intend to give anything in these lands to the residuary devisee. This latter rule would govern all cases of lapsed devises; for if the testator were to die immediately upon the making of the will there would be

[1] See, *accord.*, *Lingan* v. *Carroll*, 3 H. & McH. 333 (1793); *Tongue* v. *Nutwell*, 13 Md. 415, 427, 428 (1858); *Van Kleeck* v. *Reformed Dutch Church*, 6 Paige, 600 (1837), affirmed 20 Wend. 457; 1 Jarm. Wills (4th ed.), 647.

[2] The opinion only is here given.

nothing undisposed of, and the devisee would take; but if the devisee were to die between the making of the will, and the death of the testator, the devise would lapse and the heir-at-law would necessarily take in preference to the residuary devisee, for it was not undisposed of *at the making* of the will, but the devise was rendered inoperative by a subsequent accident — the death of the devisee. This is not so in the case of a void devise; for there at the making of the will nothing passes, nothing is disposed of, and the residuary devisee under the clause "all the residue of my estate" takes, and not the heir-at-law. In *Doe, Lessee of Stewart* v. *Sheffield*, 13 East, 526, this is considered as the settled law; and in *Doe on the demise of Wells and Others* v. *Scott and Another*, 3 Maule & Sel. 300, Lord Ellenborough in delivering the judgment of the court recognizes the authority of the two preceding cases as "admitted law" on the subject.

We are not unaware of the American decisions on this subject in 6 Conn. Rep. 292, and in *Lingan* v. *Carroll*, 3 Har. & McHen. 333; but we prefer following the authorities which we have cited. The heirs-at-law do not appear to have been objects of the testator's bounty; they are nowhere mentioned in her will. This circumstance is not relied on in forming our judgment, but merely to show that the testatrix did not desire that her heirs-at-law should derive any benefit from her estate. Our decision is founded upon the authorities which we have cited, and upon the principles established by them. Our opinion is therefore for the residuary devisees, and judgment is accordingly given for the plaintiffs in the case of the *Lessee of McKnight and Others* v. *Hedges;* and in the other case, lessee of J. Ferguson and others, the heirs-at-law of Mary James, against the same defendant, that judgment be given for the defendant.[1]

Macbeth and *Wales*, for the heirs-at-law.

Gray and *Read, Jr.*, for the residuary devisees.

Booth and *J. A. Bayard*, for the church.

MASSEY'S APPEAL.

SUPREME COURT OF PENNSYLVANIA. 1879.

[*Reported* 88 *Pa.* 470.]

JANUARY 28th, 1879. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, WOODWARD, TRUNKEY, and STERRETT, JJ.

Appeal from the Orphans' Court of Philadelphia County: of January Term 1879, No. 86.

Appeal of Anna E. Massey and others, residuary legatees under the will of Mary P. Loxley, deceased.

[1] See *Hayden* v. *Stoughton*, 5 Pick. 528, 536, 537 (1827).

This was a petition by the personal representatives of two of the next of kin of the testatrix, for a review of the auditor's report and the decree confirming the same, whereby the amount of a lapsed legacy was awarded to the residuary legatees; and praying that the said legacy might be awarded to her next of kin.

The petition avers, that Mary P. Loxley, by the last codicil to her will, dated August 6th, 1866, bequeathed, *inter alia*, as follows: "I do hereby give, devise and bequeath unto said John Yard, Jr., and Charles Yard, all the city of Philadelphia loans of every description now standing in my name, amounting in all to the sum of $116,300, or the equivalent of the same in money, should I dispose of the same or any part thereof during my lifetime; this bequest to be free and clear of all collateral inheritance tax."

That by her will, dated February 6th, 1860, she directed her executors to sell and convert into money all the rest, residue and remainder of her estate, real, personal and mixed, of which she might die seised, possessed or entitled to, and to divide the net proceeds thereof among persons therein named.

That John Yard, Jr., died before the testatrix; that the auditor awarded the moiety of city loan, bequeathed to him, to the residuary legatees of the testatrix, and that his report was confirmed by the Orphans' Court.

That Charles Yard appealed to the Supreme Court, which dismissed his appeal, saying: "It is proper before closing to say that we give no opinion on the question whether the lapsed legacy to John Yard, Jr., fell into the residue. The parties representing that question are not before us."

That in the case of *Yard, Executor of Mary P. Loxley* v. *Murray*, decided by the Supreme Court on the same day, that court held that the residuary clause of a will must evince a special intent to pass over lapsed portions of the estate into the residue.

That the petitioners are the personal representatives of two of the next of kin of the testatrix, and that they were advised that there was error apparent in the record, in awarding the lapsed bequest to the residuary legatees. The petition prayed that the proceedings might be reviewed and that the said lapsed legacy might be awarded to the next of kin of the testatrix.

The answers of the residuary legatees set up that there was no apparent intention of the testatrix to die intestate as to any part of her estate, because she had made disposition of the whole thereof, and that the lapsed legacy passed by law to them as her residuary legatees.

In an opinion, the court, *Penrose*, J., said: —

"It is doubtless true that the prevalent opinion among the legal profession in this city was, that a legacy lapsing by reason of the legatee's death in the lifetime of the testator, in the cases not otherwise provided for by Statute, passed to the residuary legatees. This was

stated by Sir William Grant, in *Cambridge* v. *Rouse*, 8 Ves. Jr. 25, as having 'been long settled.' As to a lapsed devise, the rule was supposed to be different, the reason given being, that a will as to realty spoke only from the time of making it, and the residuary devisee could only take what at that time was intended for him: *Jones* v. *Mitchell*, 1 Sim. & Stu. 294.

"This reason for the distinction was taken away when the Act of 1833, providing that the real estate of a testator acquired after making his will shall pass by a general devise, in the absence of words indicating a contrary intention, was enacted.

"There was another reason sometimes given, namely: that the 'heir could not be disinherited without an express devise or necessary implication;' but as the right of succession to personal property of an intestate was conferred by the same Act of Assembly, and in terms quite as absolute as the right of inheritance to real estate, this reason cannot be regarded as a very satisfactory one, and accordingly in *Patterson* v. *Swallow*, 8 Wright 490, Judge Woodward declares that the old distinction between lapsed legacies and lapsed devises no longer exists in Pennsylvania.

"That a devise to John Yard, Jr., which lapsed by reason of his death, in the lifetime of the present testator, did not, under the language of the residuary clause, pass to the residuary devisees, was the very point decided by the Supreme Court in the recent case of *Yard* v. *Murphy*, 5 Norris 113. Why should there, in view of what was declared in *Patterson* v. *Swallow*, *supra*, be a different rule with regard to the lapsed legacy? In both cases the right of the parties claiming the residue rests upon the same clause in the will. If insufficient for one, why should it avail the other? That it does not, is clearly within the reasoning of Chief Justice Agnew, in delivering the opinion of the court in *Yard* v. *Murphy*. It is evident that the language of the court was not used inadvertently or in forgetfulness of the distinction that had been supposed to exist, because when the opinion was prepared, the appeal in the case now before us, which involved a question affecting the right to the lapsed legacy, was also under consideration, having been argued during the same week, and the opinion having been delivered on the same day. The very point, therefore, could not fail to present itself to the mind of the court, although the question argued before it had been, not the distinction of the lapsed legacy, but whether there had been a lapse at all. The auditor, however, had discussed the question of distinction, and after an elaborate consideration of the authorities had made distribution among the residuary legatees. No one had excepted to his action in this respect, and this court had decreed distribution accordingly. The auditor's reasoning, and the authorities were therefore before the Supreme Court. That they have failed to convince and that there was a very decided opinion that the distribution, if made in conformity with the decree as it there stood, would not be a proper one, appears from the very significant manner

in which attention is called to the point in the opinion affirming the decree. 'It is proper before closing to say that we give no opinion whether the lapsed legacy to John Yard, Jr., fell into the residue. The parties representing that question are not before us.' This is what was said in *Yard's Appeal*, 5 Norris 129. With the vast accumulation of business in the Supreme Court, it is impossible to suppose that this invitation to further litigation in an estate, which otherwise would have been closed at once, would have been given, had it not been the deliberate opinion of the court that injustice would otherwise be done. The case will not rest upon our decision of it; we prefer, therefore, to follow what we are convinced was the view of the court of last resort; if we are mistaken, our error will be there corrected. We now decide that the legacy, which lapsed by reason of John Yard's death, did not pass to the residuary legatees, but that the parties entitled are the next of kin of the testatrix, Mary P. Loxley.

"So much of the report of the auditor and of the decree thereon as awards any portion of the legacy, which lapsed by reason of the death of John Yard, Jr., to the residuary legatees, must, therefore, be revised and set aside, and the report recommitted to the auditor for correction."

From this decree this appeal was taken.

Louis C. Massey, *John A. Clark*, *Joseph B. Townsend* and *George W. Biddle*, for appellants.

E. L. Perkins, *John G. Johnson*, *Uselma C. Smith*, and *E. Spencer Miller*, for appellees.

Mr. Justice Woodward delivered the opinion of the court, March 24th, 1879.

In Pennsylvania, throughout its history as a Province and a State, the rules of the common law regarding the devolution of property described in lapsed devises and bequests have been accepted as in full force. They have been constantly applied and acted on by the courts and by members of the bar. While there have been indications of a belief in the minds of individual judges in some recent cases that the Act of the 8th of April 1833 has modified them, they have never been departed from in any precedent of controlling authority. Under these rules, real estate, the devise of which had lapsed, has been always held to descend to heirs-at-law, and to form no part of a residuary estate created by a testator's will, except where a special intent to the contrary has been apparent. This principle was taken for granted in *Allison* v. *Kurtz*, 2 Watts 185. It is true that the lapse in that case was of part of the residue, but Judge Sergeant, in the opinion, did not advert to that distinction. On the other hand, personal property, where a legacy has lapsed, has with equal uniformity been given to residuary legatees: *Woolmer's Estate*, 3 Whart. 477; *Nyce's Estate*, 5 W. & S. 254. In *Woolmer's Estate*, Judge Kennedy quoted the remark of Sir William Grant, in *Leake* v. *Robinson*, 2 Meriv. 392,

that "it must be a very special case, indeed, in which there can be at once a residuary clause and a partial intestacy."

Neither the integrity nor the authority of these rules has been impaired by the exceptional cases that from time to time have been decided. In *Patterson* v. *Swallow*, 8 Wright 490, where residuary devisees were held entitled to take land, the names of the persons designed to be made particular devisees had been omitted in the draft of the will of the testatrix. Blanks left for the insertion of the names had not been filled. It was purely a void, and not a lapsed devise. And in *Neff's Appeal*, 2 P. F. Smith 326, where both personal property and land were decided to belong to the next of kin, the lapsed devise and legacy had been of parts of the residuary estate, and thus came within the exception stated in *Leake* v. *Robinson*, of "some part of the residue itself ill-given."

From some expressions in the opinion in *Patterson* v. *Swallow*, it is manifest that the judge who delivered it believed that the Act of 1833 had destroyed the distinction between real and personal property, and that land embraced in a lapsed devise should go to residuary devisees. And from some expressions in the opinion in *Yard* v. *Murray*, 5 Norris 113, it might be inferred that it was the design of the court to declare not only that the distinction was obliterated, but that the result of the obliteration had been to cast the real and personal estate alike upon the heirs-at-law. But in each of those cases, the language employed in entering the judgment was aside from any point involved or ruled.

In the consideration of *Yard v. Murray*, after the argument — and it was carefully and deliberately considered — there was hesitation on the part of some members of the court to affirm the judgment of the Common Pleas. In the first place, it was thought that the language of the residuary clause in Miss Loxley's will was exceptionally comprehensive. The gift was of "all the rest, residue and remainder" of her "estate, real, personal and mixed," of which she should "die seised, possessed or entitled to." The opinion of the court upon the effect of the Statute of Wills had been expressed emphatically and without qualification in *Patterson* v. *Swallow*, and there was an inclination to accept and adopt that opinion, especially as no case of binding force recognizing the contrary doctrine had been decided subsequently to the enactment of the Statute. And it was urged that in this State, where under almost all circumstances the same principles govern the distribution of real and personal estates, symmetry would be given to the legal system by establishing the rule that land, like personal property, should go, in the event of lapse, into the residuary estate.

There were, however, considerations, which were in the end controlling, to be taken into account on the other side. The principles of the common law had been rules of property for generations before 1833, and during a period of almost fifty years after the Statute of Wills was passed, estates had been settled, titles had been acquired and con-

veyed, and counsel had advised and instructed clients on the theory that they remained rules of property still. The very paucity of precedents was enough to prove the settled and pervading professional opinion that the old rules had been left unchanged. An Act of Assembly would have only prospective operation, and would do no wrong. A departure from the accepted theory of the law by a judicial decision would be fruitful of wide-spread mischief. Besides, in order to reach such a decision, the statutory words would have to be strained. The tenth section of the Act of 1833 declared simply that real estate acquired by a testator after making his will should pass by a general devise. Equivalent words had been so construed in Massachusetts and Maine, as to work out the result contended for in *Patterson* v. *Swallow*, while precisely the contrary view of the effect of such words had been taken by the courts of New York. The English Statute of Wills had left nothing for construction. By the third and twenty-fourth sections, the substance of the tenth section of our Act of 1833 was enacted, and the twenty-sixth section declared in terms that a residuary clause should include land described in lapsed and void devises. Upon like grounds an affirmance of the judgment was finally agreed to without dissent.

No issue is involved in this appeal except that relating to the personal estate of the testatrix. The opinion of the Orphans' Court stated the law with entire accuracy, and their decree might safely be reversed for the reasons contained in that opinion. But it has been thought right that the unanimous judgment of the members of this court on this branch of the law of the Commonwealth should be pronounced. It may be that it would be wise to introduce the principle of the twenty-sixth section of the English Statute into our system. But in deciding *Yard* v. *Murray*, it was felt that it could only be introduced with safety by the action of the Legislature.

The decree of the Orphans' Court is reversed, and it is now adjudged and decreed that the decree of that court, made on the 4th of November, 1876, *be reinstated and restored, with all the force and effect the same would have if no part of it had been at any time annulled, subject, however, to the exception that the costs of this appeal be paid out of the fund for distribution.*[1]

[1] And see *Van Cortlandt* v. *Kip*, 1 Hill, 590 (1841); *Rizer* v. *Perry*, 58 Md. 112 (1881). But *contra* are *Thayer* v. *Wellington*, 9 Allen, 283, 295 *et seqq.* (1864); *Drew* v. *Wakefield*, 54 Me. 291 (1865).

SECTION II.

ADEMPTION.

A. *Revocation of Devises by Conveyance.*

NOTE. — The cases in this subdivision have been placed here for convenience of treatment. They might properly have come under the head of Revocation of Wills.

MOUNTAGUE *v.* JEOFFEREYS.

1596.

[*Reported Moore*, 429, *pl.* 599.]

IN trespass it was found that Sir Jo. Jeoffereys, Chief Baron, being seised in fee of the manor of Marifield, and in fee expectant on a lease for years of Grovelands, made a will in writing, by which he devised the manor and Grovelands to the defendant Jeoffereys; and after this will was made, he covenanted with Goring to make a feoffment to the use of himself, and Mary, the daughter of Goring, whom he purposed to marry, which feoffment he made by letter of attorney and livery executed in the manor, but not in Grovelands, nor was there any attornment of the tenant of Grovelands; and he married the daughter of Goring, and afterwards in the same will he interlined certain words with his own hand in the clause making his executor, viz., where before he had made Margery his daughter his sole executrix, he now added these words, "Mary, my wife." And afterwards he died, and [the question was] whether the land called Grovelands passed to Jeoffereys the defendant. The jury found him not guilty, but if the land did not pass to him by the will, they found him guilty. And it was argued several times on these two points, viz. (1) Whether the feoffment, without execution of livery or attornment in Grovelands, was a revocation of the will as to Grovelands. (2) The second, admitting it to be a revocation, whether writing the words interlined was a new publication of the entire will. It seemed to the court that this was a revocation for everything; they doubted about the publication.[1]

[1] See *Beard* v. *Beard*, 3 Atk. 72 (1744).

PERKINS *v.* WALKER.

CHANCERY. 1682.

[*Reported* 1 *Vern.* 97.]

ONE John Walker having by a voluntary settlement made himself tenant for life, with a power to lease or grant for a thousand years at any rent, he by deed grants the whole term to trustees, in trust that he himself should enjoy the same during his life, and afterwards in trust, by sale or otherwise to raise out of the premises several sums of money for payment of his debts, and to discharge a mortgage of £200 and other sums, which he appointed to the plaintiffs, his nephews and nieces; which deed was with a power of revocation.

After this, the said John Walker having occasion for money, he mortgages this estate three several times to Sir William Humble, having before that made his will and confirmed his said first deed, and thereby appointed other legacies to be paid by his trustees.

The point insisted on was, that by these subsequent mortgages to Humble, the said Walker had revoked his will, and the former deed, that was made with a power of revocation. *Sed non allocatur;* it might be a revocation *pro tanto*, but no otherwise.

And the LORD CHANCELLOR [LORD NOTTINGHAM] cited the case of *Coke and Bullock*, 2 Crook, 49. That a man having by will devised a fee simple, afterwards by indenture makes a lease for years of the same lands; this lease, if not made to the same person, shall be a revocation *pro tanto* only, even at law: and the principal case is much stronger in equity, which will charge and subject an equity of redemption.

EARL OF LINCOLN'S CASE.

CHANCERY. 1695.

[*Reported Freem. C. C.* 202.]

THE late earl devised his estate in fee, and afterwards being in treaty of marriage, he by lease and release conveyed his estate to trustees, to the use of him and his heirs until the marriage took effect, and after the marriage, to the use of himself for life, remainder to his intended wife for life, with remainder to issue, &c. The earl afterwards dying before the marriage, the question was, Whether this conveyance should amount to a revocation.

It was argued, That it was not a revocation, because when the marriage took no effect, the conveyance took none neither.

And it was said that a feoffment in fee to the use of the devisor and his heirs, would be no revocation, because it is in the nature of the old use.

That which is a revocation at law, is sometimes none in equity, as a fine levied to corroborate the will is a revocation at law in strictness; but being levied for that purpose, it was said *per* FINCH, that it would amount also to a republication in equity; and the same it is of a feoffment for that purpose, and so it was said it had been held in this court; and two cases were cited, of *Thorne and Thorne*, 1 Vern. 141, and of *Hall and Dunch*, 1 Vern. 339, 342; 2 Ch. Rep. 297, in 1689, where the court of equity had ruled that to be no revocation in equity, which would have been so at law; and a case was cited of *Montague and Jefferies*, Moor. Rep. 429; Roll. 616.

Agreed a lease for years is a revocation only *pro tanto*, unless made to the devisee, and then *in toto*, according to the case Cro. [Jac. 49].

Agreed a mortgage in fee is no absolute revocation, but the equity of redemption will go to the devisee.

Resolved afterwards, that it was a revocation, and upon an appeal so held in the House of Lords, carried only by two lords.[1]

LUTHER *v.* KIDBY.

KING'S BENCH. 1730.

[*Reported* 3 *P. Wms.* 169, *note.*]

A. AND B. tenants in common of lands in fee. A. by will dated 25 January, 1719, devised his moiety in fee; afterwards A. and B. made partition by deed, dated 16 May, 1722, and fine, declaring the use, as to one moiety in severalty, to A. in fee; and as to the other moiety in severalty to B. in fee; on its being sent by the LORD CHANCELLOR KING to the judges of the King's Bench to give their opinion, whether this was a revocation of the will? it appears by the register's book, that the court, viz. LORD RAYMOND, Chief Justice, PAGE, PROBYN, and LEE, Justices, certified,

"That they were all of opinion, that the will of the said A. was not revoked by the deed and the fine levied in pursuance thereof; and that the said A.'s share of the lands contained in the deed, and the fine levied thereon, did pass by the will of the said A." with which the LORD CHANCELLOR concurred, and ordered that the several trusts in the said will of A. should be established.

[1] See *Parsons* v. *Freeman*, Ambl. 116 (1751); *Sparrow* v. *Hardcastle*, Ambl. 224 (1754). "The absurdity of *Lord Lincoln's Case* is shocking. However, it is now law." — *Per* LORD MANSFIELD, C. J., in *Doe* v. *Pott*, 2 Doug. 710 (1781); *Brydges* v. *Chandos*, 2 Ves. Jr. 417 (1794); *Cave* v. *Holford*, 3 Ves. Jr. 650 (1798), — s. c. *sub nom. Goodtitle* v. *Otway*, 2 H. Bl. 516; 7 T. R. 399.

HICK *v.* MORS.

CHANCERY. 1754.

[*Reported Ambl.* 215.]

THOMAS BALDWIN, who was a sailor, being seised in fee by indenture 10th January, 1749, in consideration of £100 covenanted to levy a fine to the use of Hick, who was an attorney at law, for 1,000 years, by way of mortgage, to secure a sum of money, with remainder to such uses as Baldwin should appoint.

Upon the 10th of May, 1750, Thomas Baldwin made his will, and devised to Hick in fee.

Afterwards, Baldwin was prevailed upon by Hick to execute an indenture of 24th May, 1750, of three parts, between Thomas Baldwin of first part, Denton of second, and Hick of third part; whereby, after reciting the deed of 10th January, 1749, and that the fine had been levied, Thomas Baldwin, in consideration of 10*s.* covenanted that the fine should inure to Denton in trust for Hick in fee.

LORD HARDWICKE, Chancellor, in giving his opinion, what effect the conveyance of 24th May, 1750, would have upon the will, declared, There was no doubt at law but that it is a revocation, which depends upon intention; therefore an imperfect conveyance is a revocation. Intent doth not mean intent to revoke, but to make a different disposition. So a conveyance intended to strengthen a will operates as a revocation. *Lord Lincoln's Case.* Thomas Baldwin meant to make a conveyance. This is not like the case of a conveyance by covin, which would make it not his deed at law. That would be a nullity; but here the whole passed, and could not be re-invested without a reconveyance.[1]

[1] Followed in *Simpson* v. *Walker*, 5 Sim. 1 (1831). *Hawes* v. *Wyatt*, 3 B. C. C. 156 (1790), is *contra*.

"As to the cases of covin at law, if a deed is void at law, absolutely void for covin, it may perhaps be treated as a nullity: but till the case of *Hawes* v. *Wyatt* I conceived there was a great difference between a deed void at law for covin and a deed which in this court could be set aside for fraud, either by cancelling it or by directing a re-conveyance, upon the ground, that at law it was not a nullity, nor admitting the plea of *non est factum*, but, that upon equitable circumstances, constituting a fraud in this court, the legal effect of it is reduced; and this court says, it shall not prevail, by directing an act to be done to reinstate the other party. If *Hawes* v. *Wyatt* is right, it contradicts *Hick* v. *Mors* to a very considerable extent; and must be supported upon this principle, if any: that where a man is induced by fraud, this court considers him as having no will. He is compelled by fraud as much as a partition is compelled by the writ." — *Per* LORD ELDON, C., in *A. G.* v. *Vigor*, 8 Ves. 256, 283 (1803).

See also *Harwood* v. *Oglander*, 6 Ves. 199, 215 (1801). On the general subject of this subdivision, see 1 Jarm. Wills (4th ed.), 147–167, and *Walton* v. *Walton*, 7 Johns. Ch. 258 (1823).

B. *Ademption of Specific Legacies.*

PARTRIDGE *v.* PARTRIDGE.

CHANCERY. 1736.

[*Reported Cas. temp. Talb.* 226.]

THE testator by his will devised £1,000 capital South Sea stock to his wife for life, for her sole use and benefit, with power to dispose of the same to such of her children as she should think fit. At the time of making his will he was possessed of £1,800 South Sea stock: he afterwards reduced such stock to £200, but after that purchased as much as made up the £200 to be £1,600, and afterwards died in July, 1733. In June next before his death the Act took place for changing three fourths of the capital South Sea stock into annuities. The questions made upon this case were, first, whether the testator selling £1,000 part of his £1,800 South Sea stock, after the making his will, should not be considered as an ademption of the legacy. If not, secondly, if the Act for turning South Sea stock into annuities should not be so considered. In the argument of this case the case of *Ashton and Ashton*, Cas. Temp. Talb. 152; 3 P. Will. 384, was cited, where the testator devised £6,000 South Sea stock to J. C., and at the time of his death and will was possessed of only £5,500 South Sea stock; upon which a bill was brought against the executor to have it made up £6,000. But the Master of the Rolls, and after him the Lord Chancellor, on appeal, were of opinion the deficiency should not be supplied, upon this principle, that, as general legatees have no lien on what is given to specific legatees, so a specific legatee shall have no lien on the general fund of the testator; but if any loss happens to what is specifically given to him, he must bear the burden thereof himself.

LORD CHANCELLOR [TALBOT]. All cases of ademption of legacies arise from a supposed alteration of the intention of the testator; and if the selling out the stock is an evidence to presume an alteration of such intention, surely his buying in again is as strong an evidence of his intention that the legatee should have it again. It was not the particular stock he was possessed of that he gave; but the devise was only describing the nature of the thing he gave, of which he had sufficient to answer such legacy at the time of his death. If the testator after such legacy sells out part, and dies, such sale would afterwards be looked upon as an ademption *pro tanto*. If he devises so much particular stock, and at the time of such devise has not any such stock, it is a direction to the executor to procure so much for the legatee. It would be very hard in the case at bar, to consider the selling as an ademption, because he might sell out for some particular purpose, and

as soon as that purpose was answered he might buy in again. As to the second point, after such devise, the Legislature thought proper to make a law to change three fourths of the stock into annuities, and the fourth to remain as it stood before; so that the testator, when he died, was possessed of £1,200 annuities, and £400 stock; and it would be extremely hard to say, that this alteration of the stock by Parliament should work an ademption, when it cannot be presumed the testator's intent was particularly asked, or that he concurred or agreed to such law in any other manner than what every other person is supposed to do.[1]

If an obligee was to devise a legacy of £1,000 secured by bond from A. B., and he should afterwards compel A. B. by due course of law to pay it him, this would be an ademption of the legacy; but it was never thought, if A. B. should pay in the money voluntarily, it would be an ademption, because the obligee is bound to receive it.

DINGWELL *v.* ASKEW.

CHANCERY. 1788.

[*Reported* 1 *Cox*, 427.]

CERTAIN quantities of stock were previously to a marriage vested in the names of trustees, and were upon the marriage settled to the separate use of the wife for her life, then to the issue of the marriage, then to such persons as the wife should by will appoint, and in default thereof to the wife absolutely; and in the settlement a very full and ample power was given to the wife to make a will notwithstanding her coverture, and to dispose of this property as she should think fit. The wife made a will during coverture, in which she recited the power she had under the settlement, and in pursuance of that power she disposed of the stock, and then the husband died in her lifetime without issue. After the death of the husband the wife took a transfer of the stock from the trustees into her own name; and died without making any other will than as aforesaid. And the question was, whether the calling in the stock from the trustees should be a revocation or an ademption of the bequest.

It was argued to be a revocation or ademption on the ground that by the transfer the wife acquired to herself a new estate or interest in this fund from that which she had at the time of making her will, and upon which that will operated; that the same presumption would be raised in this case, as where a man makes a will of land, and afterwards by feoffment or otherwise takes a new estate in the same land to himself, and precisely for the same interest as he had in it before, yet

[1] See *Oakes* v. *Oakes*, 9 Hare, 666 (1852); *Walton* v. *Walton*, 7 Johns. Ch. 258 (1823).

such feoffment will work a revocation. The interest which she acquired by the transfer was very different from that limited to her by the settlement, and the specific subject of her bequest was therefore gone at the time of her death.

Master of the Rolls. [Sir Lloyd Kenyon.] This case is new *in specie*, but I have very little doubt about the grounds on which I am to decide it. If it could be proved, that when the wife took the transfer, her intention was altered, it would decide the question; but there is no such thing in proof here; and if I were to hazard conjecture on the subject, which I am not inclined to do, I should think her intention remained the same. Under the settlement she had a power of disposing of this property beneficially by will. The property was then in trustees, which was necessary for securing it from the control of the husband; but the instant the husband died, the reason for vesting it in the trustees ceased; her interest in it after the transfer was not in fact more beneficial, but only more convenient to her, which however was a sufficient reason for her to wish to get rid of the intervention of the trustees. It has been decided that where a person, having an equitable interest in real property, devises it, and afterwards gets the legal estate, this will be no revocation. So here there is no new beneficial interest acquired. If therefore we were to construe this with equal strictness as the rules respecting real estate, it would be no revocation; much less so in case of personalty. I am therefore very clearly of opinion, though I know no case in point, that this property will pass by this will.

STANLEY *v.* POTTER.

Chancery. 1789.

[*Reported* 2 *Cox*, 180.]

Edward Stanley, by his will of the 29th day of Oct. 1777, reciting that some time in or about the month of Jan. 1772, he the said testator had advanced and lent unto James Campbell, of Craignash, in Scotland, the principal sum of £2,000 sterling, and for securing the repayment thereof, with interest at five per cent per annum, or an annual rent of £100 sterling, with liquidate penalty, expenses of enfeoffment, and *termly failzies*, the said James Campbell did duly execute to him the said testator his the said James Campbell's certain heritable bond, bearing date the 27th day of January 1772, and thereby and by a ratification thereof by Mrs. Ann Campbell, wife of the said James Campbell, bearing date the 12th day of February 1772, and instrument of sasine taken upon the said heritable bond, dated the 27th day of January 1772, divers lands, islands, and other hereditaments and premises were and stood charged with the due payment of the said principal sum of £2,000 and interest, or annual rent of £100 for the same in manner

therein mentioned, he the said testator gave and devised that all the said annual rent of £100 sterling, or such annual rent, less or more, as by the law for the time being should correspond to the said principal sum of £2,000 to be taken as afore-mentioned, and all the said lands and premises for and in real security, and more sure payment of the said £2,000 sterling &c. and all his estate, right, title, and interest therein to the several uses, and upon and for the several trusts, intents, and purposes thereinafter mentioned (that is to say), to the use and behoof of John Latham and Thomas Potter, their executors, administrators and assigns, for and during the term of 99 years, in case his the said testator's daughter Anne Stanley should so long live, upon the trusts, and to and for the intents and purposes thereinafter mentioned and expressed concerning the same, and from and immediately after the expiration of the said term, and in the mean time subject thereto, to the use and behoof of George James Stanley for life, &c. with divers limitations over. And in case the said sum of £2,000 should at any time thereafter be paid off and discharged, then the said testator did will, order, and direct that the same should be paid unto and received by the said John Latham and Thomas Potter, or the survivor, &c. and the said testator did thereby will and direct that they his said trustees should, as soon as conveniently might be after the receipt thereof, lay out and invest the same in the purchase of freehold lands, tenements, and hereditaments, to be settled and conveyed to and upon the same uses, trusts, and purposes, as thereinbefore limited and declared concerning the said annual rent and premises aforesaid; and in the mean time and until such purchase could be had, he directed that the said sum of £2,000 should be laid out and invested by his said trustees in government securities, and the dividends thereof should be paid to such person or persons as would be entitled to the rents of such lands if purchased.

In the year 1786 James Campbell paid off the debt of £2,000 to the testator; but the testator left his will unaltered in respect of the bequest of the £2,000 and died in the month of January 1789. There being no particular circumstances in the case respecting the mode in which this debt was paid off, or the appropriation of the money by the testator in his lifetime, the question now was whether this bequest was not adeemed by the debt being paid to the testator before his death.

Lloyd, in support of the bequest.

Lord Chancellor [Thurlow]. When the case of *Ashburner* v. *Macguire* [2 Bro. C. C. 108] was before me, I took all the pains I could to sift the several cases upon the subject, and I could find no certain rule to be drawn from them, except this, to inquire whether the legacy was a specific legacy (which is generally the difficult question in these cases), and if specific, whether the thing remained at the testator's death; and one must consider it in the same manner as if a testator had given a particular horse to A. B. if that horse died in the testator's lifetime, or was disposed of by him, then there is nothing on which the

bequest can operate. And I do not think that the question in these cases turns on the intention of the testator. The idea of proceeding on the *animus adimendi* has introduced a degree of confusion in the cases which is inexplicable, and I can make out no precise rule from them upon that ground. As to the case of *Attorney-General* v. *Parkin*, [Ambl. 566], I collect from the note I read of that case, that Lord Camden would have had great difficulty in making those legacies contributory in the event of a deficiency of assets; and if so, I cannot conceive how they are to be taken as general legacies for any other purpose; they must have had all the consequences of general legacies, or none; they could not be specific to one purpose, and general to another. This I cannot understand. And I believe it will be a safer and clearer way to adhere to the plain rule which I before mentioned, which is to inquire whether the specific thing given remains or not. For where a testator gives by his will a particular sum of money, and he afterwards receives and spends it, I see no end to the confusion arising from the following any other line.

His Lordship therefore declared the legacy to be adeemed.[1]

FRYER *v.* MORRIS.

CHANCERY. 1804.

[*Reported* 9 *Ves.* 360.]

ELEANOR IVANSON, by her will, dated the 21st of February, 1800, made among others the following bequest:—

"I give and bequeath unto Charles Phillott all such sum and sums of money as my executors may after my death receive on the interest note of £400 given to me by Messrs. Cross & Co., bankrupts, Bath, either as a dividend under their commission in part thereof, or which they my executors may receive from the representatives of the late James Cross, deceased, or otherwise, in respect of such note, in trust for all and every the children of the said Elizabeth Fryer that shall live to attain the age of 21 years, equally to be divided between them."

The testatrix died on the 26th of May, 1800. On the 28th of April preceding the sum of £385 18*s.*, remaining due on the note, was paid to her; and was paid by her into the hands of Messrs. Clement and Tugwell, bankers in Bath; in whose hands she had no other money; but on the 12th of May, she drew the sum of £10 18*s.*; leaving in their hands at her death the sum of £375.

The bill was filed by the infant children of Elizabeth Fryer against the executors, to have the money received on the note secured for their

[1] See *Barker* v. *Rayner*, 5 Mad. 208; s. c. 2 Russ. 122 (1826); *Wyckoff* v. *Perrine*, 37 N. J. 118 (1883).

benefit; and the question was, whether under the circumstances the legacy was adeemed?

The bill charged, that the payment was made without any demand by the testatrix; that she did not blend the money so received with her general estate, or with any other money; but kept it, except the sum of £10 18*s.*, separate and apart from all the money she had; and that she had no expectation, that the money would have been paid in her life.

The answer stated, that some considerable time before the testatrix's death she did take legal steps to recover her debt; and also proved her debt before the Master in a cause, instituted by some of the creditors of the bankrupts. They admitted, there was no other property of the testatrix at the time of the payment, or at her death, in the hands of Clement and Tugwell.

Mr. Richards and *Mr. Roupell*, for the plaintiffs.

Mr. Romilly, for the defendant the executor.

The Master of the Rolls. [Sir William Grant.] It does not appear, whether these persons were her own ordinary bankers. This is not, as it is put in Swinburne, laying it up, and safely keeping it for the legatory; but merely paying it to these persons. It is impossible to support this as a subsisting bequest. The principle of ademption by receiving the thing given is certainly, that the thing given no longer exists; for, if after the receipt of it, it could be demanded, that would be converting it into a pecuniary, instead of a specific, legacy. It is said, this is pecuniary; as it is a bequest of the money to be received. But that is the case of every bequest of a debt. If anything could be made of the circumstance of placing the money with these bankers, it is counterbalanced by the other circumstance, that she drew out a part of that money. That is treating it as her own. If she meant to appropriate it, and consider it as a legacy still standing, and binding upon her estate, she ought not to have touched it. This is not so much to be considered a partial ademption, as evidence of her having deposited it there, to be at her own command.

The bill was dismissed.

PATTISON *v.* PATTISON.

Chancery. 1832.

[*Reported* 1 *Myl. & K.* 12.]

James Pattison, by his will, dated in April, 1829, gave to Margaret Forbes, among other bequests, the sum of £50 long annuities, which he described as purchased with £1,000, left him by the will of James Tillard, Esq.

The testator subsequently intermarried with Margaret Forbes; and by a codicil to his will, he confirmed to her, in addition to what she

was entitled to under the settlement made upon her marriage, all and every sum and sums of money, property, estate, and effects given and bequeathed to her, under the name of Margaret Forbes, by his will.

At the time of making his will, the testator had, besides the £50 long annuities specifically bequeathed, other annuities of the same description; and he afterwards exchanged all his long annuities for new annuities; by which exchange he made a profit by way of *bonus*, amounting to £100. The term for which the new annuities were granted, was shorter than the term of the long annuities by a quarter of a year.

Subsequently to this transaction, the testator made another codicil, by which he confirmed his will and former codicil. The question in the cause was, whether the widow was entitled to the £50 new annuities purchased with the produce of the £50 long annuities given to her by the will.

Mr. Bickersteth and *Mr. Lloyd*, for the widow.

Mr. Pemberton and *Mr. Wigram*, contra.

THE MASTER OF THE ROLLS. [SIR JOHN LEACH.] The law is settled that a legacy is adeemed if the specific thing do not exist at the testator's death. The testator truly described the specific gift when he made his will, and there can be no relief upon the ground of mistaken description.

IN RE BRIDLE.

COMMON PLEAS DIVISION. 1879.

[*Reported* 4 *C. P. D.* 336.]

APPEAL from the County Court of Dorsetshire. Petition by Louisa Bridle, asking for the payment out of court to her of £200.[1]

John Bridle died in 1877. By his will, made in 1872, he bequeathed to the petitioner the mortgage of £200 which he had secured to him on a mortgage of premises in Melcombe Regis. The petitioner, against the objection of the executors of John Bridle's will and of the residuary legatees thereunder, introduced evidence that in 1873, the mortgage above mentioned was paid off; that John Bridle paid the mortgage money into the bank of Williams & Company; that he had a regular account at that bank; that he did not pay this money into his general account, but had it entered in his name to a separate account, which he opened with the bank for that purpose; that he received a separate pass-book; that he handed this pass-book into the custody of the petitioner, stating to her, when he did so, that it was the money he had received from the mortgage, and that she was to keep the book, as he had willed the money to her, for her to receive it after his death, and

[1] The following abbreviated statement is substituted for that in the report.

stating that it would show that the money was for her, and would do away with the necessity of altering his will in consequence of the mortgage being paid off; and that the £200 remained intact in the bank down to the death of John Bridle, he only drawing the interest from time to time, and the petitioner retaining possession of the pass-book. This evidence was uncontradicted. Williams & Company paid the money into a post-office savings bank in the name of the registrar of the County Court to await the decision of the court.

The judge ordered the costs of all parties to be paid out of the £2,000, and the balance to be paid to the petitioner. The executors and residuary legatees appealed.

Bethell, for the appellant.

John Cutler, contra.

Denman, J. The testator by his will bequeathed to the petitioner "the mortgage debt of £200 which he had secured to him on a mortgage of premises in King Street, Melcombe Regis, belonging to William Hardy." It is impossible to read those words without seeing that the obvious intention of the testator was to give her the mortgage itself. Has there, then, been an ademption? That depends upon the rule stated by Lord Hardwicke, C., in *Humphreys* v. *Humphreys*, 2 Cox, C. C. 184, where he said that "the only rule to be adhered to was, to see whether the subject of the specific bequest remained *in specie* at the time of the testator's death, for, if it did not, then there must be an end of the bequest; and that the idea of discussing what were the particular motives and intention of the testator in each case in destroying the subject of the bequest, would be productive of endless uncertainty and confusion." In all the cases relied on by Mr. Cutler, the language of the will was general, and no one of them conflicts with the rule there laid down, that, in the case of a specific bequest of a thing which has ceased to exist during the lifetime of the testator, the legacy is adeemed.

Lindley, J. I am of the same opinion. The first question here is what was bequeathed to Louisa Bridle. It is a bequest of a mortgage, — a specific legacy. The only other question is, where is it? It is not to be found; and there is an end of it. In all the cases relied on by Mr. Cutler, there was a bequest of something which at the death of the testator could be found. This doctrine is as old as the case of *Ashburner* v. *Macguire*, 2 Bro. C. C. 108, where Lord Thurlow, C., says: "As to the ademption, one maxim has gained so much ground as to have been a governing rule, and has been recognized by Lord Talbot and Lord Hardwicke. It is that, where a debt is bequeathed, and is afterwards extinguished by the act or concurrence of the testator, as by demand or suit, the legacy is adeemed; but, if paid in without suit or demand, there is no intention to adeem: and there are innumerable authorities that a legacy of a debt is not adeemed by a voluntary payment. Lord Camden, in *Attorney-General* v. *Parkin*, Amb. 566, expressly exploded this distinction: so did Lord Macclesfield. I am

inclined to adopt their opinions, because I can find no ground for the distinction but a passage in Swinburne, § 20, p. 7, 6th ed., p. 548. But I doubt if the authors cited by him support him. Godolphin, Orphan's Leg., 4th ed., p. 434, referring to the same books, states the rule differently; and so have other writers. By the civil law it was competent for a man, after he had changed the subject-matter of a specific legacy, to declare by his conduct that such a change was an ademption. The case put is of a gold chain which the testator, after having bequeathed it by his will, converts into a cup: the legacy is not adeemed, because the cup might be restored to its former shape. This has not been adopted by our law. There is no ground to say that, after a legacy is extinguished, a man by his conduct may revive it. It is contrary to common sense; as appears by the instance put. The gold chain may have been given as a legacy because it had been long in the testator's family. If it be afterwards converted into a gold cup, the reason for giving it ceased." And see the judgment of Lord Thurlow in *Stanley* v. *Potter*, 2 Cox, C. C. 180, where it was held that a bequest of a debt is adeemed by the debt being paid to the testator in his lifetime, whether the payment be compulsory or voluntary, or whether the sum be expressed in the bequest or the debt bequeathed generally. For these reasons, I am of opinion that the petitioner is not entitled to the £200, and the judgment of the County Court judge must be reversed, with costs.

Judgment reversed.[1]

[1] See *Blackstone* v. *Blackstone*, 3 Watts, 335 (1834).

NOTE.— On the ademption of the legacy of a lease by its renewal, see *Abney* v. *Miller*, 2 Atk. 593 (1743); *Carte* v. *Carte*, Ambl. 28 (1744).

A specific legacy is not adeemed by a change of investment ordered but not effected at the time of the testator's death. *Basan* v. *Brandon*, 8 Sim. 171 (1836).

A testator and chattels which he had specifically bequeathed perished together at sea. *Held*, that the legatee was not entitled to the insurance money. *Durrant* v. *Friend*, 5 De G. & Sm. 343 (1852).

If a testator, after making his will containing a specific legacy, becomes lunatic, the legacy is adeemed, if the subject-matter is disposed of by order of court, *Jones* v. *Green*, L. R. 5 Eq. 555 (1868); *In re Freer*, 22 Ch. D. (1882); or, being a debt, is paid to his committee, *Hoke* v. *Herman*, 21 Pa. 301 (1853). But if the property bequeathed has been disposed of without authority, the legacy is not adeemed, if the property exists *in specie*, *Taylor* v. *Taylor*, 10 Hare, 475 (1853); or if its proceeds can be traced, *Jenkins* v. *Jones*, L. R. 2 Eq. 323 (1866).

On the ademption of an appointment under a power, see *In re Johnstone's Settlement*, 14 Ch. D. 162 (1880).

A testator bequeathed all notes of hand which were payable to him at the date of a codicil, January 5, 1849. The testator then held four notes, payable to himself, and signed by Samuel S. Hill and his brother. On February 24, 1849, these notes were taken up, Hill's brother was released at his own request, and four notes payable to the testator, signed by Hill and secured by mortgages, were given to the testator. The notes taken up and the notes given were for one and the same debt. *Held*, that the legacy was not adeemed. *Ford* v. *Ford*, 3 Fost. 212 (1851).

C. *Ademption of Portions.*

IZARD *v.* HURST.

CHANCERY. 1697.

[*Reported Freem. C. C.* 224.]

THE defendant's testator by his will gave his four daughters £600 apiece, and afterwards married his eldest daughter to the plaintiff, and gave her £700 portion; after that he makes a codicil and gives £100 apiece to his unmarried daughters, and thereby ratifies and confirms his will, and dies; and the plaintiff preferred his bill for the legacy of £600 given to his wife by the said will; and the only question was, whether the portion given by the testator in his lifetime, should be intended in satisfaction of the legacy? And held [by SIR JOHN TREVOR, M. R.] that it should; and agreed to be the constant rule of this court, that where a legacy was given to a child, who afterwards upon marriage or otherwise[1] had the like or a greater sum, it should be intended in satisfaction of the legacy, unless the testator should declare his intent to be otherwise; and it was said the words of ratifying and confirming do not alter the case, though they amount to a new publication, being only words of form, and declare nothing of the testator's intent in this matter.[2]

[1] Cf. *Leighton* v. *Leighton*, L. R. 18 Eq. 458 (1874).

[2] An earlier decision is *Jenkins* v. *Powell*, 2 Vern. 115 (1689). That an ademed legacy is not revived by a codicil has been often held. *Monck* v. *Monck*, 1 Ball & B. 295, 306, 307 (1810); *Booker* v. *Allen*, 2 Russ. & M. 270, 300 (1831); *Powys* v. *Mansfield*, 3 Myl. & Cr. 359 (1837); *Hopwood* v. *Hopwood*, 7 H. L. C. 728 (1859); *Langdon* v. *Astor*, 16 N. Y. 9, 57 (1857).

"The ademption of a legacy of personal estate is not usually called revocation. When the term just mentioned is not used, the act is called satisfaction, payment, performance or execution. But when these terms are thus used, it is not quite in their ordinary sense; for their primary relation is to some debt, duty or obligation resting absolutely upon a party, whereas a will, having no effect in the testator's lifetime, does not bind him to anything. The word ademption is the most significant, because, being a term of art, and never used for any other purpose, it does not suggest any idea foreign to that intended to be conveyed. It is used to describe the act by which the testator pays to his legatee, in his lifetime, a general legacy which by his will he had proposed to give him at his death. (1 Roper, 365, ch. 6.) It is also used to denote the act by which a specific legacy has become inoperate on account of the testator having parted with the subject. But that is immaterial here. Aside from the Statute, an advancement of a like sum, with intent to pay the legacy in question, would, in the understanding of every lawyer, be an ademption. Now, the Statute does not say anything, in terms, respecting ademptions, nor does it allude to the subject in any way, unless it does so in using the term revocation. To revoke is to recall what one has done or promised. A testator who concludes to anticipate a proposed testamentary gift cannot be said, by any just use of language, to revoke or recall it, when, so far from wishing to undo what he has done, he has concluded to do it sooner than

HOLMES *v.* HOLMES.

CHANCERY. 1783.

[*Reported* 1 *Bro. C. C.* 555.]

HOLMES the father, who was a jeweller, by his will dated in November, 1771, [amongst other bequests] gave his son £500; and £2,000 [on trust to be invested for] four unmarried daughters, [in equal shares of £500 each]: then gave his son the utensils of his trade (which were of trifling value) and gave the residue of his personal estate to his wife for life; and after her death, he gave further legacies to his daughters: to some £500, and to others £1,000; and, if any surplus, to be divided amongst all his children who should be then living, (there being then

he before intended. By a very loose and indeterminate use of language, anything which renders a bequest inoperative at the testator's death may possibly be called a revocation, and we are shown in the opinion referred to that there are instances where it has been so used. Lord Macclesfield is reported to have said, in a case of double portions, that by the laws of all other nations, as well as of Great Britain, the last was a 'revocation of the portion given by the will.' The reference to foreign laws shows that the word was used in a very general, and not in a strict or technical sense. It was not said that the will or any part of it was revoked, but that it was a revocation of the portion. It was in a very short opinion taken down by the reporter. (1 P. Wms. 681.) But Lord Eldon, in a more elaborate opinion, in a case of alleged double portions, used the same terms for the like purpose. After qualifying the gift *inter vivos* as an ademption half a dozen times, and as satisfaction still oftener, and alluding to an objection made at the bar, that if the testator had not intended that the legacy should be paid he would have altered his will, he adds: 'The answer [to that objection] is, that the subsequent advance operates as a revocation, and therefore actual revocation is unnecessary.' The meaning is not that the subsequent advance was in a proper sense revocation, but that it operated in that instance in the same way; as if he had said there was no need of his revoking it, as the ademption or satisfaction just as effectually extinguished it. (18 Ves. 155.) But there are a few cases in which judges have been called on to discriminate, in precise and accurate language, between ademption and revocation. *Rosewell* v. *Bennet*, 3 Atk. 77, already referred to, was the case of a legacy for a special purpose, which it was adjudged he had accomplished by an advance of money in the testator's lifetime. The defendant's counsel relied upon the Statute of Frauds and Perjuries. Lord Hardwicke said: 'As this act of the testator after making his will is not a *revocation* of the will, but an *ademption* only of the defendant's legacy, I am of opinion that the plaintiff ought to be let into this evidence,' &c. (3 Atk. 78.) In *Kirk* v. *Eddows*, which has been cited, the defence was that the legacy had been adeemed in part. The Vice-Chancellor, Sir James Wigram, said: 'The evidence [to prove his advancement] does not touch the will. It proves only that a given transaction took place after the will was made, and proves what that transaction was, and calls upon the court to decide whether the legacy given by the will is not thereby adeemed. An *ademption* of the legacy and not *revocation* of the will is the consequence for which the defendant contends.' The Vice-Chancellor then referred to the judgment of Lord Hardwicke, above mentioned. (3 Hare, 519.) These two cases are just one hundred years apart, and connected as the last is by a reference to the first, they may be taken to show the sense of the English Chancery, during all that time, upon the distinction in question." — *Per* DENIO, C. J., in *Langdon* v. *Astor*, 16 N. Y. 9, 39-42 (1857).

seven in all). In 1779, he took his son into partnership with him, and, by the deed of partnership, the stock was to be £3,000, to be brought in equally, and they were to be equally entitled to the profits. The father brought in the whole capital, and it was understood, by the whole family, that he meant to give the son the half of the stock. The children who were of age, by their answer, admitted this; and there was parol evidence of declarations of the testator, at different times, that he meant to bring his son into partnership, and to give him half the stock, and even the whole; and that he told one witness, that he had brought his son in, and had given him £1,500. The question made in the cause was, whether this advancement was a satisfaction of the legacy of £500, and it was held not to be a satisfaction, not being *ejusdem generis;* and that it must have been the testator's intention that the plaintiff should have both. Lord Commissioner Hotham relied on an argument for the plaintiff, that if the legacy had been a moiety of the stock, and afterwards £500 had been given, it could not have been a satisfaction.[1]

[1] *Dugan* v. *Hollins*, 4 Md. Ch. 139 (1853), *accord*. On a gift subsequent to a legacy and on different conditions, see *Spinks* v. *Robins*, 3 Atk. 491 (1742).

"It is settled that in the case of double provisions by a father for a child, slight circumstances of difference are not to be regarded: at least where the question is not whether a bounty is meant to satisfy a debt; but whether one bounty is to be substituted in the place of another." — *Per* Sir William Grant, M. R., in *Hartopp* v. *Hartopp*, 17 Ves. 184, 191 (1810).

"It was pressed upon me by the counsel for the plaintiff, that the variance in the provision by the settlement and the will distinguished this case; that is a circumstance, which may avail to prove it not to be in satisfaction of a debt, or covenant, but never of a legacy given as a provision; this distinction was taken by Lord Hardwicke in the case of *Clarke* v. *Sewell*, 3 Atk. 98, and in *Trimmer* v. *Bayne*, 7 Ves. 508, this doctrine is recognized by Lord Eldon; wherein he states the question to be, 'whether the limitations being different, it was an ademption,' and lays down this rule: that where a parent or person *in loco parentis* gives a legacy, as a portion, and afterwards upon marriage, or any other occasion calling for it, advances in the nature of a portion to that child, that will amount to an ademption of the gift by will, and this court will presume he meant to satisfy the one by the other. It differs from the performance, or satisfaction of a covenant in this; that the court overlooks small differences in the circumstance of that, which is purposed to be given, and that, in satisfaction of which, it is contended to be given." — *Per* Lord Manners, C., in *Monck* v. *Monck*, 1 Ball & B. 298, 303, 304 (1810).

See also *Booker* v. *Allen*, 2 Russ. & M. 270 (1831); *Durham* v. *Wharton*, 3 Cl. & F. 146 (1835).

Cf. *Twining* v. *Powell*, 2 Coll. 262 (1845).

POWEL *v.* CLEAVER.

CHANCERY. 1789.

[*Reported* 2 *Bro. C. C.* 499.]

LORD CHANCELLOR [THURLOW].[1] My opinion will require only a few words.

Mr. Powel, by his will in 1775, gave to Harriot Charlotte Stables a legacy of £6,000, this legacy was not mentioned as being a portion. Afterwards on her marriage £5,000 in the funds, stated in the settlement to be her portion, were advanced. It is in evidence that it was advanced by Powel. It is stated in the settlement to be her portion. He also conveyed an annuity to her use: there are entries in the books of Powel, by which it appears that he had made a calculation of the sums advanced as a portion. In 1783, he made a codicil to his will, by which £5,000 were given to a niece unborn at the time of making the will. The question is, whether the advancement of £5,000 on the marriage of the defendant is an ademption *in toto* or *in part* of the legacy. A legacy *prima facie* is presumed to be a bounty to the legatee, and must stand as such *donec probetur in contrarium*. The word portion, although applied in the case of a parent, shall not be so applied to the gifts of other relations or friends; it has been determined not to extend to a grandfather. Whatever foundation there might be for the original application of the rule, that the advancement of a parent shall not be a further gift, it is not now to be disputed: but it is obvious the intent of the testator is as often disappointed as served by it. Those cases stand on their own ground; this case is an attempt to make a friend's legacy satisfied by a subsequent advancement. There are cases where a man may describe himself so, that the gift by the will, and that in his lifetime, may be intended for the same purpose, but it must appear that he meant to put himself *in loco parentis;* for there are no cases where it has been so held, if the second gift appeared to be *diverso intuitu*. I have gone through all the cases, and it appears to be the result of them, that where a stranger gives a legacy by will, and afterwards gives a sum without any evidence that it is intended for the same purpose, it is not taken as a satisfaction: to make it so, it must appear, at the time of the gift, to be meant as an ademption of the legacy.[2]

Mr. Scott, *Mr. Hargrave*, and *Mr. Mitford*, for the plaintiffs.

Mr. Solicitor-General (*Macdonald*) and *Mr. Ambler*, for the defendants.

[1] Only the opinion on the question of ademption is here given.

[2] As to when the testator is *in loco parentis*, see *Grave* v. *Salisbury*, 1 Bro. C. C. 425 (1784); *Monck* v. *Monck*, 1 Ball & B. 298 (1810); *Ex parte Pye*, 18 Ves. 140 (1811); *Booker* v. *Allen*, 2 Russ. & M. 270 (1831); *Powys* v *Mansfield*, 3 Myl. & Cr. 359 (1837).

PYM *v.* LOCKYER.

CHANCERY. 1841.

[*Reported* 5 *Myl. & Cr.* 29.]

THIS was an appeal from so much of a decretal order made by the *Vice-Chancellor* in this cause as declared that the provisions made by the testator in the cause, on the marriages of the defendants, Frederick Pym, Edmund Lockyer Pym, and Eleanor Penrose Drake (formerly Pym), respectively, were not ademptions or satisfactions of the respective legacies of £5,000, £5,000, and £6,000, by the testator's will bequeathed for the respective benefits of them and their children; and against the directions given by His Honor, consequential upon this declaration.

The testator was the grandfather of these defendants, and their marriages took place in their father's lifetime.

The provisions made upon the respective marriages were as follows: Upon the marriage of Frederick Pym, to whom a legacy of £5,000 had been given, by the will, for life, with remainder to his children, a sum of £2,000 3 per cent reduced stock was invested in the names of trustees, upon trust for himself and his intended wife, for their successive lives, and afterwards for their children, and, in default of children, for himself absolutely. Upon the marriage of Edmund Lockyer Pym, to whom a legacy of £5,000 had also been given, by the will, for life, with remainder to his children, the testator made a settlement of certain lands upon him and his children, and executed a bond for £3,000, of which trusts were declared similar to those of the lands; and upon the marriage of Mrs. Drake (Eleanor Penrose Pym), to whom a legacy of £6,000 had been bequeathed by the will for life, with remainder to her children, the testator, by letters, engaged to invest £4,000 in the public funds, upon trust, after his own death, for the intended wife and her husband, successively, with remainder to her children, and also engaged to pay, during his own life, £150 per annum for the first three years, and £100 per annum afterwards.

[LORD CHANCELLOR COTTENHAM *held* that the testator had put himself *in loco parentis*, but suggested a question whether the legacies were adeemed in whole or *pro tanto*. The question thus suggested was argued before him at a subsequent day.]

Mr. Bethell, *Mr. Loftus Lowndes*, and *Mr. Chandless*, for Frederick Pym and the children of Edmund Pym.

Mr. Richards, for Mrs. Drake.

Mr. Wigram and *Mr. G. L. Russell*, for the unadvanced grandchildren.

THE LORD CHANCELLOR. When, upon the first argument of this case, I had come to the conclusion that the testator had placed himself

in loco parentis, and that the effect of the portions upon the provisions by the will was, therefore, to be the same as if the testator had been the father of the children, I was startled at the consequences of such a decision, if the rule generally received in the profession, and laid down in all the text-books of authority, and apparently founded upon the highest authority, was to regulate the division of the property; the rule to which I refer being, that a portion "advanced by a father to a child will be a complete ademption of a legacy, though less than the testamentary portion." I could not but feel that, in the case before me, and in every other, the effect of the rule would be to defeat the intention of the parent. A father, who makes his will, dividing his property amongst his children, must be supposed to have decided what, under the then existing circumstances, ought to be the portion of each child, not with reference to the wants of each, but attributing to each the share of the whole which, with reference to the wants of all, each ought to possess. If, subsequently, upon the marriage of any one of them, it becomes necessary or expedient to advance a portion for such child, what reason is there for assuming that the apportionment between all ought therefore to be disturbed? The advancement must naturally be supposed to be of the particular child's portion; and so the rule assumes, as it precludes the child advanced from claiming the sum given by the will as well as the sum advanced.

So far the rule is founded on good sense, and adapted to the ordinary transactions of mankind. The supplying the wants of one child for an advancement is not permitted to lessen or destroy the provisions made for the others, by giving both provisions to the child advanced; but the supposed rule that the larger legacy is to be adeemed by the smaller provision, appears to me not to be founded on good sense, and not to be adapted to the ordinary transactions of mankind, and to be subversive of the obvious intention of the parent. Can it be assumed, as a proposition so general as to be the foundation of a rule of property, in the absence of any expressed intention, that the marriage of one child and the advancing a portion to such child, furnishes ground for the father's altering the mode of distributing his property amongst his children, by taking from the portion previously destined for that child, and, to the same extent, adding to the provision for the others? Is it not, on the contrary, the usual course and practice that the father, upon a child's marriage, parts with the control over as little as possible, preferring to reserve to himself the power of disposing of the residue of the portion destined for such child, as its future circumstances and situation may require? In doing so, the father is not influenced only by the natural preference of bounty to obligation, but adopts a course which he may well be supposed to think most beneficial for his children. Where, then, is the ground of the presumption, that he intended, by advancing part of what he had destined as the portion of that child, to deprive that child of the remainder?

The argument in favor of the proposition appears to me to be

founded upon technical reasoning as to the term "portion," without due consideration of the sense in which that term is used. The giving a portion to a child is said to be a moral debt, but of the amount of which the parent is the only judge; and although the parent has, by his will, adjudged the amount of that moral debt to be a certain sum, he is supposed, by the settlement, to have departed from that judgment, and to have substituted the amount settled; and this only because the one provision and the other are considered as a portion. This, however, assumes the portion settled to be intended as a substitution of the portion given by the will; and such intention, if proved, would remove all doubt; but the question is, whether such intention is to be presumed, in the absence of all proof. Is it not more reasonable to suppose that the intention as to the amount of the portion remains the same, and that the sum settled is only an advance of part of what the will declares to have been the intended amount of the whole? There is no reason for supposing the sum advanced to be the whole portion intended for the child; and if so, there can be no reason for assuming it to be substituted for the whole. The effect of a portion advanced by a parent upon a legacy before given is called an ademption; but if the principle of ademption be applied to this case, the consequence now under consideration will not follow. The gift or alienation of part of what constitutes a specific legacy will not destroy the legacy as to what remains. So, the admitted exceptions to this general rule do not seem very consistent with the existence of that part of it now under consideration. The rule is said not to apply, when the testamentary portion and the subsequent advancement are not *ejusdem generis*. This may be very reasonable, as indicative of intention, but it is not easy to discover why, if one thousand pounds advanced is to be an ademption of a ten thousand pounds legacy, a gift of stock in trade of the value of £1,500 is not to be an ademption of a legacy of £500, which, in *Holmes* v. *Holmes*, 1 Bro. C. C. 555, it was held not to be. So, a testamentary gift of a residue, or part of a residue, is said not to be adeemed by a subsequent advancement, because the amount is uncertain; but, in that case, the child, if sole residuary legatee, takes, as advancement, part of what it would, if no such advancement had been made, have taken as residue. The gift under the will operates, though diminished by the amount of the advancement. The Statute of Distributions, the customs of London and York, and the whole doctrine of hotchpot, proceed upon the principle that advancement by a parent does not operate as substitution for, but as part satisfaction of, what the child would otherwise be entitled to; the object being to produce equality, and not, according to the rule contended for, inequality, between the children.

It appears to me, therefore, that all reasoning and all analogy are against the supposed rule. It remains to be examined, whether the authorities are such as to make it my duty to act upon it; and I cannot but express the satisfaction I have felt at having had the cases so

thoroughly examined. I think the profession and the public are much indebted to those whose industry and ability have brought the real state of this question so satisfactorily before me.

Hoskins v. *Hoskins*, Pr. Ch. 263, decided in the year 1706, is a case in which a smaller sum advanced was held to be an ademption, *pro tanto*, of a larger legacy; but it does not appear whether the decision proceeded upon the evidence of intention.

Hartop v. *Whitmore*, Pr. Ch. 541, and 1 P. W. 681, determined in 1720, is a very important case, being one generally referred to in support of the supposed rule, which, if the report in Peere Williams had been correct, it never could have been. As there reported, it is a case of a legacy of £500, adeemed by an advancement of £300; but, it appears from Mr. Cox's note to Peere Williams, the report in Precedents in Chancery, and the Registrar's Book, that the whole statement of the facts in Peere Wiliams is erroneous. There was a legacy of £300 in one event, and of £200 in another, and an advancement of £200; and it was held that the £300 never became payable, in the events which happened, and that the £200 was adeemed or satisfied by the £200 advanced.

Norton v. *Norton*, in a note to *Pusey* v. *Desbouvrie*, 3 P. W. 316, was cited; but that case appears to refer to advancements under the custom of London.

The case of *Clerk* v. *Lucy*, 8 Vin. Ab. 154, in the year 1716, only proves that this supposed rule was never supposed to apply to devises of real estate; but the case is principally valuable as showing, though only from the argument of counsel, that the supposed rule does not appear to have been heard of in 1716. The counsel are reported to have said: "Suppose a father by his will gives his daughter £10,000, and afterwards marries her, and gives her £5,000 for her portion, and then dies, without revoking his will, this is clearly not a revocation of the whole devise of £10,000, but only a revocation or satisfaction *pro tanto*, viz. £5,000, and she shall take the other £5,000 by the will. This is a plain case, and the same in reason as the present."

In *Farnham* v. *Phillips*, 2 Atk. 215, 24th of October, 1741, the decision turned upon the legacy being a residue; but Lord Hardwicke is reported to have thus expressed himself: "Where a father, after making his will, advances his child with a portion *as great or greater* than the legacy given by the will, such provision has always been held an ademption."

Dicta of judges upon matters not argued or directly before them, have had more importance attached to them than, in my opinion, they ought to have had; but such expressions, falling from such a man as Lord Hardwicke, may safely be relied upon to show that, at that time, the idea of a larger legacy being adeemed by a smaller portion was not familiar to his mind. It is the more important to keep this *dictum* of Lord Hardwicke in mind, because another *dictum* of that very eminent judge, in *Shudal* v. *Jekyll*, 2 Atk. 516 (see page 518), 25th of February, 1742, is relied upon in support of the supposed rule. The case

itself has no application to the point now under consideration, the decision having turned upon this, that the testator did not stand *in loco parentis;* but Lord Hardwicke is reported to have said: "This court, to be sure, leans strongly against double portions, or double provisions; and whether the portion given in the lifetime is less, or not, is no ways material." Lord Hardwicke may have meant that, so far as the portions are double, *i. e.*, the one a repetition of the other, one only shall prevail; and that it is not material whether such repetition be as to part or as to the whole of the legacy, which would make this *dictum* consistent with the former; but, assuming that the obvious meaning of the words is to recognize the supposed rule, the effect will be removed by the fact of the erroneous report of *Hartop* v. *Whitmore* having been cited; and, the point not being the subject of argument or decision, Lord Hardwicke may, naturally, at the moment, have assumed that report to be a correct exposition of the law. A *dictum* under such circumstances could have no weight against a contrary opinion expressed only a few months before.

The case of *Rosewell* v. *Bennet*, 3 Atk. 77, in the year 1744, is a decision only as to the admissibility of evidence; and Lord Hardwicke's observations show that he considered the £300 legacy and the £200 advanced as intended for the same purpose; which places this case in that class which have decided that, even when the testator is a stranger, the advance of money to effect the purpose for which the legacy was given operates as an ademption; and in Mr. Roper's book on Legacies (Vol. I., page 329), the case of *Rosewell* v. *Bennet* is cited in support of that proposition. It is also to be observed that if the £200 advanced had, *per se*, raised the presumption of an intention to revoke the £300 legacy, the evidence tendered would have been useless to fortify the presumption, as there does not appear to have been any evidence offered to repel it.

Clarke v. *Burgoine*, 1 Dick. 353, *anno* 1767, is another case generally cited in support of the supposed rule, and, as reported in Dickens, it would be a strong authority for that purpose; for it is there represented that Lord Camden decided that a settlement of £6,000 was an ademption of two legacies of £3,500 each; but, upon reference to the Registrar's Book, it appears that, instead of there having been two legacies of £3,500 each, there were three legacies, one of £2,000, one of £500, and one of £1,000, making together only £3,500; so that this case does not bear upon the question.

It thus appears that the only two cases in which it appeared that a smaller advancement had been held to be an ademption of a larger legacy, that is, *Hartop* v. *Whitmore* and *Clarke* v. *Burgoine*, are inaccurately reported, and that in neither of them did the facts exist to raise any such question.

In *Grave* v. *Lord Salisbury*, 1 Bro. C. C. 425, in 1784, the point decided was different; but the Attorney-General, in arguing for the ademption, only contended that, in provisions by a father for a child,

the general principle was, that every sum of money advanced was a satisfaction for so much of the legacy.

The case of *Powel* v. *Cleaver*, 2 Bro. C. C. 499, in the year 1789, was not decided upon any point applicable to the present case; but the doctrine now in question was much discussed, and Lord Thurlow, in one part of his observations, supposes a possible case of a legacy of £6,000 being adeemed by an advancement of £5,000, but upon the untenable ground that £5,000 *in præsenti* was equal to £6,000 under the will of a living man, assuming, therefore, that the advancement must be of equal value with the legacy; but this the supposed rule, if it existed, would repudiate, as it is not conceived to regard the relative values of the legacy and the advancement, provided both be in the nature of portions.

In *Robinson* v. *Whitley*, 9 Ves. 577, in 1804, the legacy was £1,000, and the sum advanced £500. Sir William Grant thought the presumption was altogether rebutted by the evidence; but the counsel, who argued in support of the ademption, only contended "that an advancement by a father to a child was considered, *prima facie,* as an advancement, *pro tanto*, of what was given by the will."

In *Monck* v. *Monck*, 1 Ball & B. 298 (see page 304), in 1810, the legacy was £5,000, and the sum advanced upon the marriage of the legatee was £4,000, and Lord Manners says the £4,000 is certainly a satisfaction *pro tanto* of the £5,000; but he dismissed the bill, because it was proved that another sum of £1,000 had been previously paid by the testator to the legatee, in part of the £5,000.

There appear to be two cases in which this question came under the consideration of Lord Eldon, *Trimmer* v. *Bayne*, 7 Ves. 508, in 1802, and *Ex parte Pye*, 18 Ves. 140, in 1811; but in neither was there any decision upon it. In the former, the legacy and the provision were equal: in the latter, the legacy was £4,000 and the advancement £3,000. All that was contended for was, that the £3,000 was to be considered as an advancement, and in *part* satisfaction of the legacy of £4,000. Lord Eldon decided that the advancement was not a satisfaction of the legacy, but upon grounds which have no application to the present question. The case, therefore, is important only from the observations which fell from Lord Eldon, and it is not easy to determine on which side they preponderate. He says that, from his recollection of the case of *Grave* v. *Lord Salisbury*, Lord Thurlow stated that if a portion be given to a child by a will, and, afterwards, an advancement is made on marriage, that is, *prima facie*, an ademption of the whole, or *pro tanto;* and he afterwards says that it is the unquestionable doctrine of the court, that where a parent gives a legacy to a child, and afterwards advances a portion on marriage of that child, though of less amount, it is a satisfaction of the whole, or in part: the meaning of which, as I understand it, is, that if the advancement be equal to the legacy, it is a total ademption, and if less, *pro tanto* only; and he immediately proceeds to state that some cases have gone the length of holding that a por-

tion, though much less than the legacy, has been held a satisfaction of the whole. As the only cases in which this appears to have been decided are *Hartop* v. *Whitmore* and *Clarke* v. *Burgoine*, Lord Eldon must be assumed to have referred to them, or to be speaking from general recollection of what appears to have been decided by them, and if so, the expressions used are accounted for; but all the importance which would otherwise belong to anything falling from Lord Eldon, is removed, by its being ascertained that both those cases are erroneously reported, and that neither of them has any reference to the doctrine they have long been supposed to establish.

The result of a careful examination of the authorities is, that there is not sufficient authority to support the supposed rule, but that, on the contrary, the weight of authority is decidedly against it; and as it cannot be supported upon principle, and is, in its operation, generally destructive of the interests which parents have intended for their children, I think it my duty, notwithstanding the manner in which it has been received in the profession, to decline adopting or following it, and, therefore, to declare that the advancements, upon the respective marriages in this case, are to be taken as ademptions, *pro tanto* only, of the legacies before given.

WESTON *v.* JOHNSON.

SUPREME COURT OF JUDICATURE OF INDIANA. 1874.

[*Reported* 48 *Ind.* 1.]

FROM the Porter Circuit Court.

S. J. Anthony, *F. Church*, *S. E. Perkins*, and *S. E. Perkins, Jr.*, for appellant.

T. J. Merrifield, for appellees.

WORDEN, J. This was an action by the appellees against the appellant, to recover the following land, situate in Porter county, Indiana, viz.: The southeast quarter of section twenty-two, in township thirty-seven, north of range five west.

Issue, trial by the court, finding, and judgment for the plaintiffs, a motion for a new trial on behalf of the defendant having been overruled; exception.

The court made what purports to be a special finding of the facts, and the conclusions of law thereon; but as this does not appear to have been done at the request of either of the parties, the finding can only be regarded as a general one. *The Board of Comm'rs of Tippecanoe County* v. *Reynolds*, 44 Ind. 509, and cases there cited.

The defendant assigned as a reason for a new trial, "that the decision was not sustained by sufficient evidence."

Other reasons were assigned, which need not be noticed.

It is objected that this reason for a new trial is insufficient, because

the word "decision" is used, instead of the word "finding." We think the word was used as synonymous with "finding," inasmuch as the insufficiency of the evidence to sustain it was pointed out. It could not have had reference to the conclusions of law from the facts found, because the sufficiency or insufficiency of the evidence has nothing to do with the conclusions of law. The plain import of the reason assigned is, that the finding of facts by the court was not sustained by the evidence. It would, in our opinion, subvert rather than promote the ends of justice to hold the reason insufficient.

The evidence is in the record, which we now proceed to consider, together with the questions arising upon it.

The plaintiffs are the heirs at law of Carey Johnson, deceased. On April 14th, 1852, Carey Johnson, who then resided in Hamilton county, Ohio, owned the land now in dispute, as well as the southwest quarter of section twenty-three, in the same township and range. These two quarter sections, it will be seen, adjoin each other, the quarter in section twenty-three lying immediately east of that in section twenty-two, the quarter in controversy in this suit. On the day last named, Carey Johnson made his last will and testament, by which he devised to the defendant, Francis Weston, the land in controversy herein, viz. the quarter lying in section twenty-two; he also devised to Carey J. Munger the quarter lying in section twenty-three. Francis Weston and Carey J. Munger were the grandchildren of the testator.

It is said, in the brief for the appellees, that at the time of the execution of the will the father and mother of Francis Weston were dead, and that he was living with his grandfather as one of his children. This, however, we do not find sustained by the evidence. It does not appear from the evidence, unless we have inadvertently overlooked it, whether his father was dead or living at that time.

On August 1st, 1853, Carey Johnson, then living, and his wife, executed a warranty deed, for the specified consideration of one hundred dollars, to the appellant, Francis Weston, for the quarter section of land lying in section twenty-three, the piece which, by the will, had been devised to Carey J. Munger. It appears that, at the time this deed was executed, the appellant was living at his grandfather's and had been a member of his family about a year. The appellant paid no money or other valuable consideration for the conveyance to him. There is no evidence in the case showing, or tending to show, that the testator intended that the land thus conveyed by him to the appellant should be received in lieu of that devised to him. It is not shown that the testator, at the time of the execution of the deed or at any other time, said anything on the subject; nor is there any evidence showing his intent in this respect. The appellant, however, was asked the following question, and gave the appended answer, viz.: —

"Was not the land deeded to you as an advancement of that which you were to take by the will, and did you not so understand it at the time?

"Ans. I did so understand it at the time."

Carey Johnson having died, the appellant took possession of the land in controversy, in the year 1870, claiming it under the will. The appellees, the plaintiffs below, claim it as the heirs at law of the deceased.

The will of the deceased gives the land to the appellant in terms; and there is no objection made to the will by the appellees, either in respect to its terms, mode of execution, or the probate thereof. But the appellees claim that the conveyance, by the testator in his lifetime, of the piece of land in section twenty-three, to the appellant, operated as an ademption or satisfaction of the devise to him of that in controversy, and, hence, that the latter parcel descended to the heirs at law.

The principle on which the appellees base their claim is thus stated by Mr. Justice Story: "The second class may be illustrated by reference to the case, where a parent, or other person *in loco parentis*, bequeaths a legacy to a child or grandchild, and afterward in his lifetime, gives a portion, or makes a provision for the same child or grandchild, without expressing it to be in lieu of the legacy. In such a case, if the portion so received, or the provision so made, on marriage or otherwise, be equal to, or exceed, the amount of the legacy; if it be certain, and not merely contingent; if no other distinct object be pointed out; and if it be *ejusdem generis;* then it will be deemed a satisfaction of the legacy, or, as it is more properly expressed, it will be an ademption of the legacy. If the portion or provision be less than the amount of the legacy, it will at all events be deemed a satisfaction *pro tanto;* and, if the difference between the amounts be slight, it may be deemed a complete satisfaction or ademption. But if the difference be large and important, there, the presumption of an intention of substituting the portion for the legacy will not be allowed to prevail." Story Eq. § 1111.

The ground of the doctrine is stated in the next following section to be, "that every such legacy is to be presumed as intended by the testator to be a portion for the child or grandchild, whether called so or not; and that, afterward, if he advances the same sum upon the child's marriage, or on any other occasion, he does it to accomplish his original object, as a portion; and that, under such circumstances, it ought to be deemed an intended satisfaction or ademption of the legacy, rather than an intended double portion."

The same author, in section 1113, thus speaks of the doctrine: "It may be added, that courts of equity make out this sort of doctrine, not upon any clear intention of the testator anywhere expressed by him, but they first create the intention, and then make the parent suggest all the morals and equities of the case, upon their own artificial modes of reasoning, of which it is not too much to say, that scarcely any testator could ever have dreamed."

But whatever may be thought of the doctrine, it is thoroughly established in English and American jurisprudence. The cases based upon

it are numerous in both countries, but no collection of them will be attempted in this opinion.

We proceed to consider whether the case in judgment falls within the doctrine stated. We may observe that the evidence tends to show that the two pieces of land are of nearly equal value, so that the slight disparity in that respect would not prevent the operation of the principle, if otherwise applicable. Here, we may observe that we attach no importance to the fact that the appellant, when he took the deed, understood that the land conveyed to him was an advancement of what he was to take by the will. His understanding in that respect can in no way affect the question involved. The intention of the testator is the important consideration, and that intention does not appear. Suppose the case were one of a bequest of a sum of money, where the principle would be clearly applicable, and the sum bequeathed had been advanced to the legatee by the testator in his lifetime, and the legatee had understood the advancement to be in addition to what he was to receive by the will, but the testator had understood it differently, the intention of the testator would clearly control, and not the understanding of the legatee.

The question, therefore, is a question of law arising upon the facts, without any evidence of the real intention of the testator, further than may be gathered from the facts, that by his will he devised to the appellant, his grandson, one piece of land, and afterward conveyed to him another piece, of equal quantity and about equal quality and value.

The rule is only applicable, as we have seen, where a parent, or one standing *in loco parentis*, makes the bequest. Great-uncles, uncles, grandfathers, or grandmothers or putative fathers, are not to be considered *in loco parentum*, unless they have intended to assume the office and duty of a parent. Williams Ex'rs, 1204; Roper Leg. 382. "The test," says the author last quoted, same volume, page 385, "in those cases seems to be, whether the circumstances, taken in the aggregate, amount to moral certainty that a testator considered himself in the place of the child's father, and as meaning to discharge that natural obligation which it was the duty of a parent to perform, for that is the principle. The mere circumstance of a provision made by a relation being so usual without any intention to interfere with the relative obligation between parent and child, that no clear inference arises from such a provision that the testator meant to substitute himself *in loco parentis*."

The evidence, as we have seen, does not show that the appellant's father was dead at the time of the execution of the will; but if it did, that circumstance would not of itself be sufficient to show that the testator intended to place himself *in loco parentis*, but it would be a circumstance to be considered. Roper Leg. 386. Nor does the evidence show that at the time of the execution of the will the appellant lived with the testator, or was in any way a member of his family. In short, the evidence does not show that the testator stood *in loco*

parentis, and, therefore, does not show that the case comes within the principle relied upon.

We however regard this as a point of minor consequence, as there are other considerations involved, more fundamental in their character, which are decisive against the application of the doctrine sought to be applied to the case.

The devise to the appellant was of certain specific land, and was a specific devise, if, indeed, all devises of real estate are not to be regarded as specific. See Wigram Wills, 2 Am. ed., part 2, 339.

We are not aware that the doctrine of the ademption of legacies by subsequent advancement has ever been applied to specific legacies; and if it is not applicable to specific legacies, it certainly cannot be to specific devises.

We are of opinion, from such examination as we have been able to give the authorities, that the doctrine has no application to specific legacies. The reason of the doctrine as applied to general legacies does not apply to specific legacies.

If a father by his will make a general bequest to his son, for example, of a thousand dollars, or a hundred head of sheep or cattle, no particular sheep or cattle being specified, so that any sheep or cattle would fill the bequest. this may well be deemed as intended for a portion for the son; and if the father in his lifetime give to the son a like sum of money, or the like number of sheep or cattle, it may well be assumed that he does it to accomplish his original object of giving the son a portion; and the courts will hold that the bequest is adeemed; otherwise the son would receive a double portion, when it is assumed that the testator intended that he should have but a single portion. But where a father bequeaths to his son a specific article of personal property, as a particular horse, a particular watch, book, or other article, pointing it out and identifying it, so that the legatee becomes entitled to the particular thing *in specie*, and not merely to any like thing, it cannot be said, nor has it ever been held, so far as we are advised, that the bequest is intended as a portion for the son. There are many motives besides an intent to give a portion, that may induce a father to give his child, by will, specific articles of personal property, or, indeed, specific parcels of real estate.

The doctrine, as applied to general legacies, cannot be practically applied to specific legacies at all, in some respects.

We have seen, that if the provision made subsequent to the will is less than the legacy, it will be a satisfaction *pro tanto*.

Suppose a father bequeath to his son a particular ten-thousand-dollar government bond, so identifying and describing it that the particular bond would pass to the legatee. But the father gives to the son in his lifetime nine thousand dollars in government bonds. Is the legacy in any part adeemed? It is conceived that the son must take the whole bond bequeathed to him, or no part of it. If, however, the testator had bequeathed his son ten thousand dollars in government bonds, but no

particular bond or bonds had been specified, the legacy therefore being general and subject to be discharged by any bonds of the description specified, the case would have been governed by the doctrine under consideration.

As before stated, we know of no case in which the doctrine of ademption by advancement has been applied to specific legacies. The elementary writers do not recognize its application to the latter class of legacies. Specific legacies are adeemed by the sale or destruction of the thing bequeathed in the lifetime of the testator. "In regard to the revocation of bequests of personal estate by ademption, the general rule is, that in order to complete the title of a specific legatee to his legacy, the thing bequeathed must, at the death of the testator, remain *in specie* as described in the will; otherwise the legacy is considered as revoked by ademption. For instance, if the legacy be of a specified chattel in possession, as of a gold chain, or a bale of wool, or a piece of cloth, the legacy is adeemed, not only by the testator's selling or otherwise disposing of the subject in his lifetime, but also if he should change its form so as to alter the specification of it, as if he should convert the gold chain into a cup, or the wool into cloth, or make the piece of cloth into a garment, the legacy shall be adeemed." 1 Jarman Wills, 4 Am. ed., page 172, note 1.

In Roper Leg. 329, under the sub-title of "the ademption of specific legacies," it is said: "The word 'ademption,' when applied to specific legacies of stock or of money, or securities for money, must be considered as synonymous with the word 'extinction.' For it should be observed, that if stock, securities, or money, so bequeathed, be sold or disposed of, there is a complete extinction of the subjects, and nothing remains to which the words of the will can apply; for if the proceeds from such sale or disposition were to be substituted and permitted to pass, the effect would be (as expressed by a learned judge), to convert a specific into a general legacy. But with respect to general legacies not given as portions, the rule respecting ademption depends upon different considerations. The intention of the testator is immaterial in the ademption of specific legacies, because the subject being extinct at the death of the testator, there is nothing upon which the will can operate; but it is otherwise in regard to general legacies which are payable out of the general personal estate; there the question whether any advancement by the testator in his lifetime to the legatee shall be considered an ademption or in substitution of the bounty given by the will must depend entirely upon the fact, that such was the testator's intention."

This whole paragraph seems totally inconsistent with the idea that a specific legacy can be adeemed by advancement in the lifetime of the testator. The word "ademption," when applied to specific legacies, he regards as synonymous with "extinction." Then the same author, in the same volume, at page 364, under the title "of general legacies, and their ademption," &c., discusses the subject of ademption by subsequent advancement. See, also, Wigram Wills, 360, 361, part 2.

In 2 Redfield Wills, 439, the doctrine of ademption by advancements is stated as applicable to general legacies.

In *Langdon* v. *Astor's Ex'rs*, 16 N. Y. 9, the doctrine of ademption by advancements was discussed and applied, but the learned judge who delivered the opinion of the court (Denio, C. J.) remarked (page 33): "In what I shall have to say upon this question, I shall assume that the legacy in question is not specific, but pecuniary and general." This remark would have been unnecessary, and, indeed, inappropriate, had it been supposed that both classes of legacies stood upon the same ground in this respect.

If, as before observed, a specific legacy is not adeemed by advancements, it follows, as we think, quite conclusively, that a specific devise of land is not adeemed by advancement. Moreover, we are not advised of any case in which the doctrine of ademption by advancement has been applied to devises of real estate.

In the case of *Davys* v. *Boucher*, 3 Y. & Col. Ex. 397, decided as late as 1839, it was said by Alderson, B., that as far as his researches had extended, he did not find any instance of this principle having been extended to devises of real estate.

In Williams Ex'rs, 1202, the author says: "It should seem also, that the principle does not extend to devises of real estate," referring to the case in 3 Y. & Col. So, in 2 Red. Wills, 441, it is said, referring to the same case, that "the principle of ademption, by a subsequent portion, has not been applied to devises of real estate."

In the case of *Clark* v. *Jetton*, 5 Sneed, 229, 236, it is said by the court, that "this doctrine of ademption does not apply to real estate."

These are all the authorities upon the point that have come under our notice. The negative authorities are meagre, and, of themselves, inconclusive. But the absence of affirmative authority for the application of the doctrine to devises of real estate is conclusive that it is not applicable to them.

But the counsel for the appellees, in a well prepared and able brief, has suggested that Baron Alderson in supposing, as he did in the case cited from 3 Y. & Col., *supra*, that there was no case in which the principle had been applied to devises of real estate, was mistaken. Several cases are cited, in which it is claimed that the principle was thus applied. We proceed to examine them.

The first is that of *Williams* v. *Duke of Bolton*, 1 Dick. 405; 4 Drury & Warren, 225. It appears to have been decided in the case cited, that a gift of a rent-charge might be a satisfaction of a sum in gross charged upon land. This, however, is not in point. A sum of money charged upon land is not the land itself. The money, the subject of the legacy, is personal, and when it is paid the land is freed. The charging of it upon land is only a mode of securing its payment. These observations apply also to the cases of *Hartopp* v. *Hartopp*, 17 Ves. 185, and *Brudenell* v. *Boughton*, 2 Atk. 261.

The case of *Lechmere* v. *Earl of Carlisle*, 3 P. Wms. 211, was this: There was a covenant to settle lands of a certain value, and a subsequent purchase by the covenantor of lands of a smaller value, which were, at the covenantor's death, undisposed of, and which went by descent to the covenantee. It was held, that the land so purchased was a satisfaction *pro tanto*. We do not regard this case as at all in point. A covenant to settle lands is totally dissimilar to a devise of lands; so, also, is the descent of lands to one a different thing from a conveyance of it to him. A similar case was that of *Wilcocks* v. *Wilcocks*, 2 Vern. part 2, 528.

The cases of *Roscwell* v. *Bennet*, 3 Atk. 77, and *Kirk* v. *Eddowes*, 3 Hare, 509, are no further in point than to show that the doctrine of ademption by advancement is not based upon the theory of a revocation of a will.

The case of *Bellasis* v. *Uthwatt*, 1 Atk. 497, is cited for the following observations of the Lord Chancellor: "In respect to the doctrine of satisfactions for money before due, the thing given in satisfaction must be of the same nature, and attended with the same certainty as the thing in lieu of which it is given, and land is not to be taken in satisfaction for money, nor money for land. It is true, here they are both of the same nature, both personal estates," &c.

This extract shows that the Chancellor was speaking of a case where a bequest was to be taken in satisfaction of money before due, and not where something advanced was to be taken as an ademption of the bequest. Besides this, both were personal.

The remark put by way of illustration, that "land is not to be taken in satisfaction for money, nor money for land," by no means establishes the proposition, nor do we think it conveys the idea that the doctrine of ademption, as applied to general legacies, applies to devises of land.

We have thus considered the authorities cited to show that the doctrine has been applied to devises of land. In our opinion, they do not show it.

From these considerations, we conclude that the doctrine of the ademption of legacies, by advancement to the legatee by the testator in his lifetime, has no application to specific legacies or devises of real estate.

It follows that the appellant's title to the land in controversy, under the will, is good, and that a new trial should have been granted.

The judgment below is reversed, with costs, and the cause remanded for a new trial.[1]

[1] "As far as my researches have extended, I do not find any instance of this principle having been extended to devises of real estate, and I think so to extend it would be to repeal that section of the Statute of Frauds which applies to the revocation of wills of real estate." — *Per* ALDERSON, B., in *Davys* v. *Boucher*, 3 Y. & C. Ex. 397, 411 (1839).

See, *accord.*, *Burnham* v. *Comfort*, 108 N. Y. 535 (1888). But in *Jones* v. *Mason*, 5 Rand. 577 (1827), it was *held* that a legacy of slave A. might be adeemed by a

SECTION III.

PRIORITY OF DEBTS TO LEGACIES.

ANONYMOUS.

CHANCERY. 1683.

[*Reported* 1 *Vern.* 162.]

A. BEING indebted unto B. makes C. his executor. C. wastes the estate and dies, and makes D. his executor, and by his will devises several legacies. D. pays the legacies. B. exhibits a bill against D.,

subsequent gift of slave B.; and in *Hansbrough* v. *Hooe*, 12 Leigh, 316 (1841), it was *held* (by two judges against one) that a devise of certain land might be adeemed by a subsequent gift of other land

NOTE. — RESIDUE. An idea was at one time prevalent that a legacy of a residue could not be adeemed by a subsequent gift, and it was so *held* in *Clendening* v. *Clymer*, 17 Ind. 155 (1861); but in *Thynne* v. *Glengall*, 2 H. L. C. 131 (1848), it was *held* that a covenant for a portion was satisfied by a residuary legacy in a will subsequently made; and in *Montefiore* v. *Guedalla*, 1 De G. F. & J. 93 (1859), it was held that a residuary legacy might be adeemed by a subsequent gift. Indeed, as LORD SELBORNE, C., points out in *Cooper* v. *Macdonald*, L. R. 16 Eq. 258, 267, 268 (1873), there is even more reason for supposing that a residuary legacy is adeemed, than for supposing that it is a satisfaction. He says: "There is (as was pointed out in the case of *Chichester* v. *Coventry*, L. R. 2 H. L. 71, in the House of Lords) a material difference in the practical application of the general rule of equity which presumes against double portions to children in cases of ademption and in cases of satisfaction. In the former class of cases the question is as to the effect of an act subsequent to the will, and not as to any intention manifested by the will itself. In the latter it is (strictly speaking) a question of testamentary intention only. When the question is one of testamentary intention, the fact that a gift of a share of residue is preceded by a direction that all the testator's debts shall be first paid may be evidence that a particular debt previously contracted in favor of a child is not intended to be paid out of that child's share of the residue. But when the question is as to the effect of a subsequent covenant to pay money for the benefit of a child, there is neither principle nor authority for the proposition, that this effect can depend upon or be influenced by the presence or absence in a prior will of any mere general provision for the payment of the testator's debts."

See also *In re Vickers*, 37 Ch. D. 525 (1888); *Van Houten* v. *Post*, 32 N. J. Eq. 709 (1880).

In *Meinertzagen* v. *Walters*, L. R. 7 Ch. 670 (1872), it was *held* that where the widow and children are residuary legatees, a subsequent gift to a child is to be considered as an ademption only for the benefit of the other children, and does not inure to the benefit of the widow.

SPECIAL PURPOSE. When a legacy is given for a special purpose, and the testator fulfils the purpose in his lifetime, the legacy is adeemed, although the testator is not standing *in loco parentis*. Thus where a testator gave "to the Newark City Mission" $2,500, "to pay the debt on Belmont Avenue Chapel," and afterwards in his lifetime paid off the debt, which amounted to $2,100, it was *held* that the legacy was wholly adeemed. *Taylor* v. *Tolen*, 38 N. J. Eq. 91, 96, 97 (1884). See *Pankhurst* v. *Howell*, L. R. 6 Ch. 136 (1870); *In re Pollock*, 28 Ch. Div. 552 (1885).

the executor of C., for his debt due from the first testator, and against the legatees in the will of C., to compel them to refund their legacies, there not being now sufficient assets of the first testator.

Decreed that the legatees should refund.[1]

DAVIS *v.* DAVIS.

CHANCERY. 1718.

[*Reported* 8 *Vin. Abr.* 423, *pl.* 35.]

BILL by an executor against a legatee to refund a legacy voluntarily paid him by the executor, the *assets falling short to satisfy the testator's debt.* Decreed that the defendant should refund to the plaintiff, and that an executor may bring a bill against a legatee to refund a legacy voluntarily paid, as well as a creditor; for the executor paying a debt of the testator out of his own pocket, stands in the place of the creditor, and has the same equity against a legatee to compel him to refund, *contra* to the opinion in 2d Vent. 358. *Noell* v. *Robinson*, and 2 Vent. 360. *Hodges* v. *Waddington*. *Per* JEKILL, M. R. MS. Rep.

SIMMONS *v.* BOLLAND.

CHANCERY. 1817.

[*Reported* 3 *Mer.* 547.]

BY indenture of lease dated the 23d of July 1798, the mayor and commonalty of Canterbury demised to Simmons (one of the aldermen of their corporation), his executors, administrators, &c. for thirty years, at a certain rent, and under covenants for payment of rent and taxes, and for repairs, &c. on non-performance of all or any of which covenants, it was declared that the lease should be void, and a power of re-entry was reserved.

Simmons, the lessee, by his will, gave all his real estates, and all his leaseholds and personal estate, to the defendant Bolland and another (whom he also appointed his executors), upon trust to sell; and after payment thereout of debts and legacies, to invest the produce in their names upon certain trusts, subject to which he gave the entire residue of his estate to the plaintiff on his attainment of the age of twenty-five years.

The testator died in 1807, leaving the plaintiff his son, then a minor. The trustees and executors proved the will, possessed themselves of

[1] See *March* v. *Russell*, 3 Myl. & Cr. 31 (1837); *Davies* v. *Nicolson*, 2 De G. & J. 693 (1858). That a creditor may, by acquiescence or laches, lose the right to have a legatee refund, see *Ridgway* v. *Newstead*, 2 Giff. 492 (1860).

the whole of the testator's estate real and personal, and paid the debts and legacies without resorting to a sale of the real estate or of the leaseholds, into the possession of which (including the premises demised by the said indenture of lease) the plaintiff, on his attaining twenty-five, entered; at which time also, the entire residue of the personal estate was transferred to him by the executors, except a bond for £1,000 from the mayor and commonalty of Canterbury, under their common seal, to the testator; and a sum of £800, 5 per cents, which were still retained by them out of the surplus, and for the recovery of which the present bill was filed.

To this bill the defendant, the surviving trustee and executor, by his answer submitted that he was entitled to retain the property in question, "for the purpose of protecting himself from any claim which might be made against him as devisee in trust and executor of Simmons deceased, in respect of rent due or thereafter to accrue due for the premises demised by the said indenture, or of the present or any future breach or non-performance of any of the covenants therein contained; the payment of which rent, and performance of which covenants, the defendant was advised he was liable to under the said indenture;" and had actually then lately received a notice to that effect from the corporation. He at the same time admitted that there were then no subsisting breaches of covenant in respect of which he was so liable, and that no rent was then due or in arrear for the premises; but insisted that, under the circumstances, he was entitled to retain as aforesaid, in respect of any future contingent demands, to which the notice given by the corporation also extended.

Sir S. Romilly and *Wilbraham*, for the plaintiff.

Cooke and *Combe*, for the defendant.

The Master of the Rolls. [Sir William Grant.] The equitable relief sought in this case depends upon a legal question, whether an executor can safely make payment of legacies, or deliver over a residue while there is an outstanding covenant of his testator, which has not yet been, and never may be broken. This question was very much discussed in a case (of *Eeles* v. *Lambert*) reported both by Styles and by Aleyn (Styles, 37, 54. 73; Aleyn, 38 s. c.), the ultimate judgment in which is not, however, stated by either. There is also a case of *Nector and Sharp* v. *Gennet*, in Cro. Eliz. 466, where the same question arose, though in a different shape. A legatee sued in the ecclesiastical court for his legacy. The executors pleaded that the testator, who was keeper of a prison, was bound in an obligation to the sheriff (to an amount exceeding the entire value of his property) for the safe keeping of the prisoners committed to his charge; which obligation had become forfeited in consequence of a judgment against the sheriffs on an action for an escape; and the executors had therefore nothing in their hands to answer the demand. This plea was disallowed, whereupon a prohibition was sued, which being demurred to, the defendant prayed a consultation. Upon this the principal question was, whether the escape

was such that the sheriff was suable in respect of it? for, if not, the bond was not forfeited; and, if the bond was not forfeited, then it was said to be plain that the legacy should be first paid; and, to this purpose, it was argued, that by the civil law, the legatary must enter into a bond, to make restitution if the obligation should be afterwards recovered; so there was no inconvenience to any. To which the whole court agreed, and determined that it was no plea, unless the obligation were forfeited. Coke said, "The difference is, when the obligation is for the payment of a lesser sum at a day to come, it shall be a good plea against the legatee before the day; for it is a duty *maintenant*, which is in the condition (as 9 E. 4, 12). But otherwise it is, where a Statute or obligation is for the performance of covenants, or to do a collateral thing. There, until it be forfeited, it is not any plea against a legatee; for peradventure it shall never be forfeited, and may lie *in perpetuum*, and so no will should be performed." The majority of the judges being of opinion that there was no forfeiture, a consultation was awarded, the effect of which, as far as it regards the present question, was to leave the spiritual court to proceed according to their own established course, — namely, to compel the legatee to give security to refund the legacy, in case of the executors becoming afterwards liable to be sued upon the bond. In the argument of *Eeles* v. *Lambert*, this case is noticed by Rolle, Justice: "It was *Nector and Sharpe's Case*, 38 Eliz. that legacies ought to be paid conditionally, viz. to be restored if the covenant should be broken." (Styles, 56.)

In *Hawkins* v. *Day*, Amb. 160, Lord Hardwicke makes a distinction between simple contract debts and legacies; and seems to entertain a clear opinion that even an unbroken covenant renders it unjustifiable for an executor to pay a legacy. I see no reason to doubt the accuracy of Ambler's report of this case; for his statement is found to correspond with the Register's book; and although, in the order overruling the exceptions, particular legacies are specified, yet it appears, by a reference which has been made to the Master's report, that they were the only legacies stated to have been paid; and they must have been paid before the forfeiture by breach of the covenants, Lord Hardwicke stating the question with respect to them to be, "Whether payment of the assets, before there was any breach of the condition, ought to be allowed as a good administration of the effects."

In this state of the authorities, it would be too much for me to order the executor to transfer and pay without having security given him in case of judgment being recovered against him at law, for any future breach of the covenant. No decree that I can make will bind the corporation of Canterbury, or protect the executor against their demand, if the bond should hereafter be forfeited. All that I can do, is to order the funds to be made over on the plaintiff giving a sufficient indemnity; and it must be referred to the Master to settle the terms of such security.

GILLESPIE *v.* ALEXANDER.

CHANCERY. 1826.

[*Reported* 3 *Russ.* 130.]

IN this suit, which was instituted for the administration of General Gillespie's estate, the original decree, made on the 15th of November 1820, directed, among other things, the usual accounts of his assets, and of his debts and legacies. On the 23d of March 1823, the Master made his report; in which he certified, that several creditors had come in before him and proved their debts, amounting in the whole to £269 19*s.* 2*d.* By an order, made on the 15th of April 1823, directions were given for paying the debts reported due; and they were accordingly paid. The decree on further directions, made on the 12th of January 1825, after ascertaining the rights of the parties, providing for the payment of the costs, and reciting that the creditors of the testator had been paid their respective debts set forth in the schedule to the Master's report, ordered, that the residue of the fund in court, and also the bank annuities which should be purchased in pursuance of the directions therein contained, should be apportioned among the legatees and the annuitants, except such of them whose legacies might appear to have been paid; and such apportionments, when appropriated in the manner therein directed, were to be considered as in discharge of the several legacies, so far as the value of such apportionments should extend. There was also a direction, that the executors should be allowed the sums which they had paid in discharge of legacies.

In November 1825, Alexander Lean, claiming to be a creditor of General Gillespie, petitioned to be at liberty to go in and prove his debt; and that so much of a sum of £14,177 16*s.* 9*d.* three per cent bank annuities, then standing in the name of the accountant-general, to the credit of the cause, as might be sufficient to raise the sum which should be reported due to him, might be sold for payment of his demand. On the 29th of November 1825, an order was made, that he should be at liberty to go in and prove such debt, he paying the costs of the petition and of the proceedings before the Master. On the 26th of July 1826, the Master reported that £1,636 1*s.* 5*d.* was due to the petitioner from the estate of General Gillespie.

In the mean time, about December 1825, the fund in court had been apportioned by the Master among the annuitant and the unsatisfied legatees; and part of it was paid out in discharge of some of the legacies. A few of the legacies had been paid long before; and those payments, though not made under the authority of the court, had been directed to be allowed to the executor by the decree of January 1825.

Lean then presented a petition, stating, that, pending his proceedings in the Master's office, the parties had proceeded to make the apportionment under the decree on further directions; and that there were standing to the credit of this cause the following sums of three per cent consolidated bank annuities: —

To the plaintiff, the annuitant's account	£5,045	18	4
To Selina Gillespie's account	4,863	10	8
To the account of the two children by the Malay girls	426	12	10
Four and Leary's account	90	3	6
Total . . .	£10,426	5	4

The prayer was, that the report might be confirmed; that the Master might be ordered to apportion to Lean as much of the several sums, standing in the name of the accountant-general to these several accounts, as should be sufficient to satisfy his debt of £1,636 1*s.* 5*d.*; and that the accountant-general might be directed to sell so much of the bank annuities so apportioned, as would be sufficient to pay the demand.

All these sums, except that carried to the annuitant's account, had been kept in court by reason of the infancy of the persons entitled to them, or their residence in a foreign country.

Mr. Tinney, in opposition to the petition.

Mr. Pemberton, contra.

The Master of the Rolls. [Sir John Singleton Copley.] It is said, it was the duty of the creditor to have applied to the court, in order to prevent any of the legacies from being paid, till his demand was satisfied; but I do not see why the *onus* of protecting the fund should be thrown on him. He is entitled to have his debt paid; and it must be apportioned among the funds of the different legatees, whose legacies still remain in court. Those legatees are not without their remedy: they can call on the other legatees to contribute.

The order of the Master of the Rolls confirmed the report, and directed the debt to be apportioned among the four sums of stock remaining in court, and to be paid by the proceeds of a proportionable part of each of the four sums.

From this order the infant, Selina Gillespie, appealed.

The petition stated, that there was still considerable outstanding personal estate of the testator, which was in the course of being gotten in; and it insisted, that Lean ought not to receive any part of his debt out of the four sums carried over to particular accounts, but only out of any outstanding estate which might be gotten in; that, at all events, it was unjust to throw the whole of the debt upon persons, whose funds, though definitively appropriated to them, had, from accidental circumstances, remained in court; and that the funds so appropriated, if chargeable at all, ought to be charged only with a proportion of the

debt, according to the ratio which those funds bore to all the annuities and legacies bequeathed by the testator. The prayer was, that the order of the Master of the Rolls might be reversed; that Lean might not receive any part of his debt out of the appropriated funds set apart for Selina Gillespie; that, at any rate, the whole of the debt might not be paid out of the four sums set apart for Selina Gillespie, the annuitant, the two children by the Malay girls, and Four and Leary, but only such part thereof as should be just, regard being had to the proportion which that annuity, and those three legacies, bore to the other legacies bequeathed by the testator; and if any part of the sum apportioned in respect of Selina Gillespie's legacy should be paid to the creditor, then that provision might be made for making the same good to her, out of any outstanding or future personal estate of the testator, which might be gotten in.

Mr. Hart and *Mr. Tinney*, for the appellant.

Mr. Heald and *Mr. Pemberton*, contra.

The Lord Chancellor [Eldon]. Although the language of the decree, where an account of debts is directed, is, that those, who do not come in, shall be excluded from the benefit of that decree; yet the course is, to permit a creditor, he paying the costs of the proceedings, to prove his debt, as long as there happens to be a residuary fund in court or in the hands of the executor, and to pay him out of that residue. If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees, and bring back the fund, he may do so; but he cannot affect the legatees, except by suit; and he cannot affect the executor at all.

The present case is involved in much singularity. Previously to January 1825, several of the legacies had been paid by the executor; and the order of January 1825 is a judgment of the court in favor of the executor, with respect to these payments, — a judgment which sanctions them upon the ground of there being a report that all the creditors had come in and were paid. The executor being thus indemnified as to these legacies, there were left in court certain funds, which were directed to be appropriated to legatees who had not been paid. In the following November the creditor makes his application: the court thinks proper to allow him to go in and prove his debt; and that order stands unreversed. In December, 1825, the Master makes his report, and appropriates the fund in court among a number of individual legatees. Now, when the creditor made his first application, it would have been well if the real state of the case had been disclosed to the court. The question would then have been, whether a creditor, so coming in, was to be paid his debt by three or four legatees, while the other legatees had received their legacies in full; or whether the rule of the court was not, that he should take from the unpaid legatees such a proportion only of his debt as would have been borne by those three or four legatees, if he had applied before the other legacies were paid, and that

he should be left to recover the residue of it by what means he best might. In short, the question is, on whom, under such circumstances, does the burden lie, of enforcing contribution against the other legatees?

Lord Eldon had not delivered a final judgment, when he resigned the great seal; but, after he quitted office, the parties having consented to be bound by his opinion, he gave the following decision: —

"My memory does not furnish me with the recollection of any case alike to this. It may, therefore, not be improper that this should be brought before the court again, and spoken to by counsel; after they have endeavored to find a precedent or precedents for such an order as that complained of.

"If no precedent to the contrary — that is, no precedent in support of the order — can be cited, I am of opinion, that, — although, if the fund carried to the account of a legatee was residue, after the payment of debts and legacies, the creditor would be entitled to be wholly paid, — yet, if adult legatees are paid, and, on the other hand, legatees, who are infants or have only partial interests, are not paid, but have funds carried to their account, such last-mentioned legatees ought to be considered, as between themselves and a creditor not coming in sooner, as not liable to pay him wholly out of what is so carried to their account, but only to pay him a due proportion of the debt; and that he must seek the payment of the rest of his debt, in proper proportions, against those who have been actually paid. I think, therefore, this order must be altered, and the creditor take only such a proportion; leaving the creditor at liberty to apply, as he shall be advised, against other legatees paid, and against funds which may yet come in; and leaving these petitioners also at liberty to apply, as they may be advised, against funds which may yet come in.

"If a precedent can be found to the contrary, that precedent must support the order as made."

The minutes of the order declared, that Alexander Lean was not entitled, as against the plaintiff, the annuitant, and the legatees, — in respect of whose annuities and legacies the several sums of bank annuities had been carried over, as in the petition of appeal mentioned, — to be paid the whole of his debt and interest proved before the Master, but only such proportion thereof as the value of the annuity, and the amount of such legacies, bore to the amount of the other legacies bequeathed by the testator's will, which had been paid. It was referred to the Master to ascertain the contributive portion of the debt and interest, which ought to be paid out of each of the four sums of bank 3 per cent annuities, standing in the name of the accountant-general, to the four several accounts before mentioned: directions were then given for raising out of the sums standing to each account its contributive proportion of the debt: and it was ordered, that Alexander Lean should

be at liberty to apply to the court, as he might be advised, against such of the legatees as had received payment on account or in satisfaction of their respective legacies; and that he and the annuitant and legatees, in respect of whose annuity and legacies the aforesaid four several sums had been carried over, should be at liberty to apply to this court, according to their respective rights and interests, with regard to the testator's estate remaining outstanding, as and when the same should be gotten in and received.[1]

NORMAN *v.* BALDRY.

CHANCERY. 1834.

[*Reported* 6 *Sim.* 621.]

On the marriage of William Baldry with Ann Freston, he, together with Simon Baldry, executed a joint and several bond, dated the 7th of October, 1802, to W. Lewis, conditioned for the payment, by the heirs, executors or administrators of William Baldry, within three months after his decease, of £490 to Ann Freston, in case she should survive him; but, in case she should die in his lifetime, then for the payment by him, of £200 within six months after the death of Ann Freston, to the persons therein named.

Simon Baldry died in March, 1820. Ann Baldry died in April, 1831, leaving her husband her surviving.

William Baldry having become insolvent, the persons entitled to the £200 under the bond, filed, in 1832, a creditor's bill against the executors of Simon Baldry.

The executors, in their answer, said that they had applied the whole of Simon Baldry's personal estate in payment of his debts *and legacies*: and that they never heard of the bond until October, 1831.

Mr. Knight and *Mr. Spence*, for the plaintiffs.

Sir E. Sugden and *Mr. Thomson*, for the defendants, the executors of Simon Baldry.

Mr. Bridger and *Mr. Bichner* appeared for other defendants.

THE VICE-CHANCELLOR [SIR LANCELOT SHADWELL] said that he had always understood the law to be that an executor who had paid simple contract creditors of his testator, a bond being in existence but not then payable, ought to be allowed those payments; but that an executor was liable, if he paid the legatees, notwithstanding he had no notice of the bond: and that he was not disposed to agree to what was attributed to Lord Kenyon in the case cited.[2]

[1] See *David* v. *Frowd*, 1 Myl. & K. 200 (1833).

[2] *Chelsea Waterworks Co.* v. *Cowper*, 1 Esp. 275 (1795), which must now be considered as overruled. See *Spode* v. *Smith*, 3 Russ. 511 (1827); *Knatchbull* v. *Fearnhead*, 3 Myl. & Cr. 122 (1837).

WALLER *v.* BARRETT.

CHANCERY. 1857.

[*Reported* 24 *Beav.* 413.]

THE testator Scarman died in 1816, having, by his will, given his property to his wife for life, and afterwards on trust for his three daughters and their children. His executors proved his will.

The testator, at his death, was possessed of some leaseholds, and by the decree made in 1854, in a suit for the administration of his estate, an inquiry was directed "whether the testator's estate and effects, or his personal representative, were subject to any and what liabilities in respect of his leasehold estates, and whether any and what indemnity against such liabilities ought to be provided or made, and in what manner."

The chief clerk's certificate found, that the testator was, at the time of his death, assignee of a lease, dated the 28th of February, 1793, granted by lessees under the city of London to James Melvin, of a house and premises, No. 68, New Bond Street, for a term of ninety years, which would expire at Midsummer, 1883, at the yearly rent of £78 15*s.*

The lease contained covenants by the lessee to pay the rent and taxes, to insure the premises against fire, to rebuild in case of fire, to keep the premises in repair, not to carry on any noisome or offensive trade, &c. And by the assignment the testator covenanted to pay the rent, to perform the covenants of the original lease, and to indemnify the assignor, his heirs, &c., against such rent and covenants, and all actions, &c., damages, costs, by reason or means thereof, or the non-payment or non-performance thereof.

The testator had underlet this property for a term which would expire at Christmas, 1872, at the yearly rent of £105, being an improved rent for the house and premises of £26 5*s.* per annum.

The testator was also, at the time of his death, assignee of a lease, dated 21st October, 1793, of the stables, &c., at the rear of the house in New Bond Street, from Lady-day, 1809, for a term which would expire in 1883, at the yearly rent of £13 13*s.* This was underlet at a total improved rent of £63 7*s.* a year. This lease contained similar covenants, and the testator had entered into the like covenants to indemnify his assignor.

By an order in this suit, made in 1854, the leaseholds were ordered to be sold. They were accordingly sold and assigned to the purchasers, who covenanted, in the usual way, to indemnify the assignor and the estate of the testator against the rent and the covenants in the original lease.

The residue of the testator's estate now undisposed of consisted of a sum of £755 £3 per cents in court, and £308 £3 per cents in the names of the legal personal representatives.

The chief clerk found that "the indemnity given by the respective purchasers of the testator's leasehold estates by the assignments, together with a recognizance to be entered into by the parties beneficially entitled to the testator's personal estate, to refund, as the court should direct, any part of such personal estate which the court might order to be paid to them respectively, in the event of any claim being hereafter established against the estate and effects of the testator, or against his personal representatives, in respect of such contingent liabilities, would be a proper and sufficient indemnity against the said contingent liabilities."

The defendants, the executors of the last surviving executrix of the testator, took out a summons to vary the certificate, by finding that the above sums or a competent part thereof ought to be retained and set apart as an indemnity against the liabilities, or that some other proper and sufficient indemnity might be provided against them.

Mr. Selwyn and *Mr. Sheffield*, in support of the adjourned summons.

Mr. R. Palmer and *Mr. Martelli* were not called on.

The Master of the Rolls. [Lord Romilly.] I have read through these papers, and have considered the question with some pains. The title is involved, but I am of opinion, upon the facts of this case, that sufficient indemnity is afforded to the executors by the certificate. The only way in which the executors, or the testator's estate, could be affected, would be by an action brought by the ground landlord: and upon the facts of this case, it would be obviously more for his interest to eject the persons in possession, than to bring any action on the covenants. I am, therefore, of opinion, that the proposed indemnity is sufficient.

I think it necessary to make one or two further observations. I wish to express the view which I take of these cases, in order not only that it may be clearly understood, but that if it be wrong, my judgment may be set right in another place. The view I take of these cases is expressed in *Dean* v. *Allen*, 20 Beav. 1, and which is this: that where executors have fairly placed all the circumstances before the court, and act under its orders, they will be indemnified against all future liabilities. I will refer to one or two authorities on the subject, in order to make the grounds on which I proceed plain. In the first place, I hold this to be established by the authorities, that if breaches of covenant have been committed at the date of the decree, and the covenantee do not come in and prove under the decree, he will be barred of all remedy against the executors, and that the executors will be perfectly safe. It is the case of an existing debt, which the creditor does not come in and prove under the decree, and the court having administered the assets protects the executors against all future claims. The creditor, however, is not left without his remedy, but that remedy is not against

the executor. That principle is so fully established in this court, that it is unnecessary to cite many authorities on the subject; but this is what Lord Eldon says in *Gillespie* v. *Alexander*, 3 Russ. 136, on the subject: "If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees to bring back the fund, he may do so; but he cannot affect the legatees except by suit, and he cannot affect the executor at all."

The *dicta* and authorities on this are exceedingly numerous. They are to be found in *Brooks* v. *Reynolds*, 1 Bro. C. C. 183; *David* v. *Frowd*, 1 Myl. & K. 200; *Williams* v. *Jones*, 10 Ves. 77; and in *Knatchbull* v. *Fearnhead*, 3 Myl. & Cr. 122, in which Lord Cottenham makes these observations: "Where an executor passes his accounts in this court, he is discharged from further liability, and the creditor is left to his remedy against the legatees; but if he pays away the residue without passing his accounts in court, he does it at his own risk." That is the principle upon which the court proceeds in such cases. So in *Low* v. *Carter*, 1 Beav. 431, Lord Langdale makes this observation: "It is to be regretted, that the jurisdiction of the court, in such cases, cannot be exercised at a less expense, but when we so frequently see suits instituted against executors, after a considerable lapse of time, and find them held personally responsible for acts done by them in mistake, but with the most honest intention, the necessity of giving them every opportunity of exonerating themselves by passing their accounts in this court is obvious." These are only some of the observations to which it is possible to refer, to show that in the case of an existing debt the executors are perfectly exonerated, if they bring all the facts which are within their knowledge before the court, and pay away the assets under its direction.

I am at a loss to conceive on what principle a debt which may arise hereafter, but which is not now existing, is to be treated on a footing different to an existing debt. The creditor, although advertised for, may be abroad at the time, he may be ignorant of the whole proceeding, and yet if he do not come in and claim, his only remedy in this court is against the legatees. In the case of *March* v. *Russell*, 3 Myl. & Cr. 31, Lord Cottenham made this observation: "Formerly, when legacies were paid, it seems to have been the practice to oblige the legatee to give security to refund, in case any other debts were discovered. That practice has been discontinued, but the legatee's liability to refund remains. The creditor has not the same security for the refunding as when the legatee was obliged to give security for that purpose, but he has the personal liability of the legatee." I hold that this, in fact, is the principle which governs these cases; that it is for the purpose of giving a greater degree of security to the executor (in case a creditor should arise hereafter), that the court requires what is called "an indemnity to the executor" to be given; but if he has stated the facts to the court, and has acted under its direction, I

apprehend that his indemnity is complete and perfect, so far as he is concerned.

In *Fletcher* v. *Stevenson*, 3 Hare, 360, 370, Sir James Wigram, who certainly took very great pains with these cases, makes these observations, in a case in which he ordered a sum of money to be retained in court as an indemnity: "So far as the executor is personally concerned, he would, I apprehend, be safe in acting under the direction of the court, but in considering what degree of protection is due to the absent covenantee, I am bound to consider, whether the court, taking the fund out of the hands of the executor, can do less than it would expect the executor to do if the fund remained in his hands." In that case he ordered a sum of money to be retained in court, but stated that to be the principle on which he proceeded. In *Dean* v. *Allen*, I made the same observations and referred to those cases, stating that it appeared to me, that if the executor acted under the direction of the court, and laid everything he knew fully and fairly before the court, he would be protected for the future, and that the court would prevent him from being sued and from sustaining any injury, in case a creditor should afterwards arise.

There are some *dicta* on the point which would perhaps bear a different construction, but I am unable to find any *dictum*, and certainly no decision, which bears directly against that view of the case, and which appears to me to be the principle and good sense of the matter. In *Dean* v. *Allen*, the case of *Simmons* v. *Bolland*, 3 Mer. 547, was referred to, where Sir William Grant says that the decree of the court is no protection to the executor, but Mr. Beavan has given, in a note, 20 Beav. 5, as I think, the proper answer to that observation: "It appears from the argument in *Simmons* v. *Bolland*, that that suit was not for the general administration of the estate, and this circumstance might therefore justify the observations of Sir William Grant, that the decree would not protect the executors."

This must be guarded against in my observations: I do not mean to say, that where an executor is ordered to pay a sum of money, in a suit which is not for the administration of the assets, it will protect him from creditors. But, I apprehend, that if, in a suit for the administration of assets, the court orders him to pay the money, that is a perfect security to him personally; for unless that were so, it would paralyze the functions of this court. This court in fact acts on the same principle with respect to non-existing debts which may hereafter arise, as it would in the case of existing debts not proved. The indemnity given is only for the sake of effecting a security, in case the court sees a reasonable probability that a creditor who is now unable to establish his case may afterwards come forward. My opinion does not interfere with, but rather carries out, although in a different form, that which Lord Cottenham, in *March* v. *Russell*, stated was the old practice.

This being the view which I take of these cases, I have thought it desirable to state it, although it does not at all affect my judgment in

this particular case, which proceeds on the facts. I think they afford a sufficient proof that the ground landlord would proceed by ejectment rather than by an action of covenant against the original lessee, by which alone this testator's assets could be affected.

I think the case of the executors fails and that the chief clerk's certificate must be confirmed.[1]

SECTION IV.

ABATEMENT OF LEGACIES.

NEWMAN *v.* BARTON.

CHANCERY. 1691.

[*Reported* 2 *Vern.* 205.]

THE question being whether an executor should compel a legatee to refund. And the case of *Grave and Bainson* cited, where one legatee being paid in full his whole legacy, and there wanting assets to pay the other legacies, it was decreed for the benefit of the unsatisfied legatees, that the legatee who had received his full legacy, should refund, and be paid only in proportion; and the case of *Hodges and Waddington*, where a creditor compelled a legatee to refund.

PER CURIAM. A creditor shall follow the assets in equity, into whosesoever hands they come. But where the executor had voluntarily paid the full legacy, and afterwards assets proved deficient to pay the other legacies, they conceived neither the executor, nor any of the other legatees should compel him to refund; but if the payment had not been voluntary, but he had recovered his legacy by decree, there he should have refunded.

[1] See *Bennett* v. *Lytton*, 2 J. & H. 155 (1860); *Dodson* v. *Sammell*, 1 Dr. & Sm. 575 (1861); *Williams* v. *Headland*, 4 Giff. 505 (1864).

"It is difficult to see why the executor should require, or the court should provide, any indemnity beyond the indemnity of the decree. It seems to me an anomaly to set apart any portion of the assets on the ground of indemnifying the executor or administrator.

"With respect to the other ground, that it is required for the benefit of the lessor, it is true that in *Fletcher* v. *Stevenson*, 3 Hare, 360, the Vice-Chancellor Wigram thought that although the decree of the court would be a sufficient indemnity to the executor, it was right to set apart a sufficient part of the assets for the protection of the covenantee; meaning, of course, that the covenantee had that equity. Now if the covenantee had such an equity, it would necessarily follow that he could file a bill to enforce it. But in *King* v. *Malcott*, 9 Hare, 692, the Vice-Chancellor Turner decided that there was no such equity, and dismissed a bill filed by the lessor to enforce it; and this seems to determine that the covenantee's right to protection is a ground that cannot be maintained." — *Per* KINDERSLEY, V. C., in *Dodson* v. *Sammell*.

As to the statutory remedies given in America to creditors against legatees, see 2 Woerner, Amer. Law of Adm., §§ 574–579.

BURRIDGE *v.* BRADYL.

CHANCERY. 1710.

[*Reported* 1 *P. Wms.* 127.]

A MAN has a wife and two daughters, and by his will devises £3,400 to be laid out by his executors in the purchase of annuities in the exchequer for 99 years term; and to be enjoyed by his wife for her life, she releasing her dower; and after her decease, to go equally to his two daughters; and bequeaths £1,000 apiece to his said two daughters, payable at their age of 21, or marriage; and dies, leaving very little more assets than would pay the £3,400 which was to be laid out in the buying the exchequer-annuities.

And objected, these were all pecuniary legacies, and there being a deficiency, they must all come into average, and suffer alike; that equality was the highest equity: and it would be very hard if the wife, who might marry again, should go away with all, so that the children might, in her lifetime, starve, and be without any subsistence.

LORD CHANCELLOR [COWPER]. The £3,400 shall have the preference; and if there be not assets enough to pay the other legacies, they must be lost.

It is of some weight, that these annuities are to go to the children after the wife's death; but especially as the wife is a purchaser of the annuities for her life, by her releasing her dower, and for that money ordered by will, or articled to be laid out in an annuity, or in land, is in equity looked upon as an annuity, or land, and consequently to be taken for a specific devise, and not a pecuniary legacy; it is therefore to be preferred before a pecuniary legacy.[1]

DYOSE *v.* DYOSE.

CHANCERY. 1715.

[*Reported* 1 *P. Wms.* 305.]

MR. DYOSE of Gray's Inn had a wife and three sons; his real estate was small, but he had a personal estate amounting to near £20,000, and by his will (*inter al'*) gave £3,000 apiece to his two younger sons, and the surplus to his eldest son, and made his wife executrix and guardian to his children, who were then all infants, and shortly after died.

On his death, it appeared that the bulk of his personal estate consisted of few items, viz., in East India stock, bank stock, and moneys in the Government funds.

[1] See *Hinton* v. *Pinke*, 1 P. Wms. 539 (1719).

Afterwards the wife married one Lyndall, who converted great part of Mr. Dyose's personal estate, and went beyond sea; and the two younger sons bringing their bill in this court for their £3,000 legacy, it was urged that it would be hard on the eldest son, to whom the father intended to be most bountiful, if he must be postponed to his two younger brothers, by their being first paid their legacies of £3,000 apiece with interest, before the eldest son should come in for anything.

Lord Chancellor [Cowper]. Let the Master take an account of what was the clear personal estate of the testator Dyose at his death; and this personal estate lying in a narrow view, and consisting chiefly but of few items:

His Lordship was of opinion, that the testator Dyose, must, at the making of his will, know what his surplus would amount unto, after his debts and legacies paid; and that he meant this surplus as a legacy to his eldest son: wherefore the court declared, it ought to be looked upon as such; and directed that the Master should compute interest, as well for what was the surplus of the testator's personal estate *at his death*, for the eldest son, as for the two legacies of £3,000 apiece to the two younger sons; and if any of the three sons had received any part of the personal estate of the father, the other two were, in the first place to receive as much, so as to put them all upon an equal footing; and afterwards all the three sons were to receive *pari passu*, in respect of the value of the surplus given to the eldest son, which was to be taken as a legacy, and in regard to the legacies of £3,000 each to the two younger sons.[1]

ATTORNEY-GENERAL *v.* ROBINS.

Chancery. 1722.

[*Reported* 2 *P. Wms.* 23.]

One Robins, a clergyman, having some personal estate, and about £400 of it in South Sea stock, which at the time of the making of his will (viz. in June, 1720) was valued at about £1,000 per cent, made his will, and thereby gave £60 apiece to his executors, for their care and pains, and £3 apiece to the poor of three several parishes, and £5 apiece to his servants, besides several other charities; and at the latter end of his will said, that he apprehended there would be a considerable

[1] "I cannot agree to the law of that case." — *Per* Lord Thurlow, C., in *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 472, 478 (1785). See *Page* v. *Leapingwell*, 18 Ves. 463, 466 (1812). "*Dyose* v. *Dyose* cannot be relied on, after the observations which have been made upon it by subsequent judges, to prove that a residuary legatee can be allowed to come in *pari passu* with other legatees in case of a deficiency of assets." — *Per* Wood, L. J., in *Baker* v. *Farmer*, L. R. 3 Ch. 537, 542 (1868).

surplus of his personal estate beyond what he had before given away in legacies, for which reason he gave several further legacies.

After this, the testator made a codicil, whereby he gave several other legacies, amounting in all to £160, and then provided in his codicil, that in case there should be any deficiency, then £200 which the testator had given by his will for rebuilding a chapel for St. John's College in Cambridge, should not take effect, saving only, that as much as should be thought necessary for that purpose should be laid out in beautifying the old chapel there, and soon afterwards the testator died.

There happened to be a great deficiency by reason of the fall of the value of South Sea stock, which the testator had computed at £1,000 per cent.

Upon which it was decreed by the MASTER OF THE ROLLS, that the legacies given at the latter end of the will being upon a presumption that there would be a surplus, and there happening to be no surplus, the former legacies in the will should have a preference, and those legacies given in the latter end of the will should be lost.

However, as to the legacies given by the codicil, it was objected, that a codicil was as a latter will, which should prevail over a former, and therefore the legacies in the codicil ought to be preferred to the legacies in the will.

PER CURIAM. The codicil must be taken as part of the will, so that if there be a deficiency to pay both all the legacies in the will, and likewise those in the codicil, constant experience shows, that there shall be an abatement in proportion; but here, when the testator in the latter end of his will said, that in regard he apprehended there was a considerable surplus, therefore he gave additional legacies, the same apprehension of a surplus must be intended to continue in the testator at the time of his making his codicil, and the legacies in the codicil should take place only out of the supposed surplus, were it not for the latter part of the codicil, viz. that the legacies in the codicil should be paid out of the £200 given for the rebuilding of the chapel, and out of the remainder of what might be thought necessary to be laid out in beautifying the old chapel.

Also, though 't was objected, that the charity legacies should be preferred to the other legacies, yet it was decreed, and said to have been formerly so ruled, that charity-legacies, being but legacies, must, on a deficiency, abate in proportion, notwithstanding that by the civil law, charity-legacies have the preference to all others.

With respect to the £3 given to the poor of three several parishes, these the court looked upon as part of the funeral, and as *doles* at the funeral; and therefore held, that no abatement ought to be made out of them.

But as to the £5 apiece given to the servants, though these had been paid by the executors, who desired an allowance on account thereof, yet the MASTER OF THE ROLLS said, he could not break into the rule,

for then there would be no knowing where to stop; wherefore these legacies were to abate in proportion.

Lastly, it was urged, that the £60 apiece, given to the executors being said to be for their care and pains, the same became a *debt:* and the executors, *virtute officii*, being entitled to a preference, might pay such their own debt first.

Per Curiam. The executors, if they please, may renounce; and the legacies to them are but legacies, and shall abate in proportion: it cannot be a debt, in regard that can never be a debt to the executors, that was not so to the testator.[1]

HUME *v.* EDWARDS.

Chancery. 1749.

[*Reported* 3 *Atk.* 693.]

This cause came before the court on petition, and a question arose, whether upon a deficiency of a testator's assets to pay all the legacies, a devisee of an annuity for life, charged on the testator's personal estate, should abate in proportion with other legatees, or whether he shall be considered as a specific legatee, and consequently not liable to abate with general legatees.

Lord Chancellor [Hardwicke] said, he believed there was a case where such a devisee of an annuity was looked upon as a specific one, and determined, therefore, he should not abate, but directed the petition to stand over, that he might look for this case.

On the 27th of May, 1749, his Lordship said, the case of *Halton, executor of General Pepper* v. *Medlicot*, s. c. cited 2 Ves. 417, was an authority in point, that an annuitant for life on the personal estate must abate in proportion with other legatees, and is not to be considered as a specific legacy.

General Pepper by his will gives A. £140 out of his personal estate, to purchase her an annuity of £20 a year for her life, if she continued in his service, and if that should not be sufficient, his executor had directions to advance her a further sum to purchase this annuity.

Upon a deficiency of assets, it was insisted A. should abate in proportion with the other legatees; Sir Joseph Jekyll was of that opinion, and ordered she should abate upon the whole sum of £140.

His Lordship, on the authority of this case, ordered the annuitant here should abate in proportion with the legatees.[2]

[1] See *Fretwell* v. *Stacy*, 2 Vern. 434 (1702); *Heron* v. *Heron*, 2 Atk. 171 (1741); *Clayton* v. *Aikin*, 38 Ga. 320 (1868). But cf. *Harper's Appeal*, 111 Pa. 243 (1885).

[2] See *Wroughton* v. *Colquhoun*, 1 De G. & Sm. 357 (1847); *Miller* v. *Huddlestone*, 3 Mac. & G. 513 (1851); *Emery* v. *Batchelder*, 78 Me. 233 (1886).

BLOWER *v.* MORRET.

CHANCERY. 1752.

[*Reported* 2 *Ves. Sen.* 420.]

LANDS were devised to trustees to be sold for payment of debts, legacies, and funeral: testator afterward gives to his wife a general legacy of £500, "to be paid her immediately after my decease out of the first money belonging to me, that should be got in after my death; and it is my further will, that my wife shall be entitled to the several legacies given to her, in full satisfaction, bar, and discharge of all dower or thirds, which she might be otherwise entitled to out of my real and personal estate."

LORD CHANCELLOR [HARDWICKE]. Cases of this kind, of a claim by pecuniary legatees of a priority of satisfaction, so as not to abate in proportion with others, seldom come before the court; and there are fewer in which the court has given way to claims of that kind; there must be therefore very strong words to induce the court to give way to it; for in most cases the court has disclaimed the laying weight on particular words, as the saying *imprimis* or *in the first place*, or a direction for the time of payment. All these are always disclaimed, and that upon just and solid reason; because if the court was upon such grounds to give a preference to one pecuniary legatee, there would be no end of it, considering the variety of expression and the incorrectness with which wills are frequently drawn; and therefore in *Brown* v. *Allen*, 1 Ver. 31, the court did not lay weight on a direction of that kind. Yet there may and have been some cases in which the court has thought the intent of the testator strong enough for it; one of which came very lately before me, *Lewin* v. *Lewin*, 2 Ves. Sen. 415 and 417, the governing reason in which case was, that the testator had constituted two residues of his estate; the first to be computed after taking out the money for the purchase of the annuity to his wife; the other to be computed after taking out the money to the pecuniary legatees: but there is nothing of that in this case. This £500 legacy affects the personal as well as the trust of the real estate: but the direction *to be paid, &c.* is not sufficient to give her a preference: for that only relates to the time of payment. He directs, that, whereas the general rule of law is, that legacies should not be paid until a year, this shall be paid immediately. The consequence is, that if it is not then paid, it should carry interest immediately; which is always considered as a compensation for delay of payment, and puts her in the same condition as if it was paid. If therefore he had directed several different times of payment to several legacies, it might be as well said, that those given payable sooner after his death than others should not abate in proportion. Then the other words, "*out of the first money, &c.*" are only consequential to

the direction, that it should be paid immediately; they are of no operation; and only a further explanation of his intent: but still all the legatees must abate in proportion, whatever time of payment the testator has directed; for that will make no difference in right or in preference. But the most material point insisted on for the plaintiff is the clause as to dower. That may depend on some facts. There is, to be sure, some color and reason, that a man giving a legacy or provision for his wife may have an intent to prefer her; because it is a duty he owes to nature; and so of children: whereas the others are out of mere voluntary bounty or favor. If the wife was at the time of making the will entitled to any dower or thirds out of testator's estate, I am of opinion she would be entitled to a preference; and that upon the ground Lord Cowper went in *Burridge* v. *Bradyl*, 1 Wms. 127, that the testator by setting a price on her dower, if she thought fit to take it, it became a purchase of her dower. So in a devise of an estate for payment of debts and legacies, out of which estate the wife was entitled to dower, the testator might set a price thereon, if she should think fit to take it. The reason Lord Macclesfield was not satisfied with this case when cited in *Hinton* v. *Pinke*, 1 Will. 439, was, because according to the book there was a wrong state of it, barely as if it was a gift of money to be laid out in land, without stating the circumstance that it was given to purchase an annuity for the wife, she releasing her dower; which was the true foundation of that determination; for I lay no weight on what is mentioned beside by Lord Cowper as of some weight, that the annuities were to go to the children after the wife's death; for that was only as to the hardship; nor that it was directed to be laid out in land; which will not vary the case, 1 P. W. 539; 3 Atk. 693; for it is still a pecuniary legacy, and must then abate in proportion. The strong ground was, that it was a purchase of the wife's dower by giving her a sum of money in lieu and satisfaction of, and upon her releasing it; and the wife may lay hold of that, if she will. It is the same as if testator says, "I give A. £500, on consideration that he conveys such an estate to my devisee or trustee." A. has then an option to say, that is a contract; he closes therewith, and makes it absolute; and will part with that estate for that money; and is not bound to abate in proportion with other legatees. So is this a purchase from the wife, and the price fixed by the husband, provided there was anything to purchase; which depends on a fact, whether the wife would be entitled to dower and had a title inchoate to dower out of his real estate; for if she had a jointure in bar of dower before the making the will, I should not then consider it as a purchase, but only as a closing everything; and the words are only of course, and amount to nothing, if she was not entitled to dower.[1]

[1] See *Davenhill* v. *Fletcher*, Ambl. 244 (1754); *Heath* v. *Dendy*, 1 Russ. 543 (1826); *Towle* v. *Swasey*, 106 Mass. 100 (1870). A pecuniary legacy in lieu of dower has precedence over specific legacies. *Borden* v. *Jenks*, 140 Mass. 562 (1886). A legacy in lieu of dower has no priority if the testator had no real estate. *Acey* v. *Simpson*, 5 Beav. 35 (1842); or none subject to dower, *Roper* v. *Roper*, 3 Ch. D. 714 (1876). See *Farnum* v. *Bascom*, 122 Mass. 282 (1877).

WALCOT *v.* HALL.

CHANCERY. 1788.

[*Reported* 1 *P. Wms.* 495, *note.*]

J. PEARCE by will, gave to the plaintiff £50 to be paid to him at his age of 21 years, or day of marriage, the same to be put out at interest in the name of his executor, Charles Pearce Hall, &c. He then disposed of the residue, and appointed C. P. Hall executor. Hall proved the will, retained the £50 for the plaintiff's legacy, and paid over the residue to the residuary legatees, and afterwards became bankrupt, and obtained his certificate. The plaintiff having attained his age of 21 filed this bill against the executor and the residuary legatees for payment of the legacy. His Honor [SIR LLOYD KENYON, M. R.] said the residuary legatees could not be liable; that the distinction was between the cases, where there was originally a deficiency of assets, and where the executor had wasted them; in the former case, a legatee, who had been paid more than his proportion, must refund to the others; but here the residuary legatees had received no more than they were entitled to, and the executor was therefore the only person to be resorted to. And his Honor, being of opinion that this demand, as against the executor, was barred by his certificate, dismissed the bill. *Sed vide Orr* v. *Kaimes*, 2 Vez. 194.[1]

GITTINS *v.* STEELE.

CHANCERY. 1818.

[*Reported* 1 *Swanst.* 199.]

IN preparing the minutes of the decree on the appeal in this case [reported 1 Swanst. 24], a question arose whether in refunding so much of the legacy of £7,000 as had been paid out of the personal estate, the legatees of that sum, who were also residuary legatees, should be charged with interest.

Mr. Bell, *Mr. Owen*, *Mr. Horne*, and *Mr. Trower*, for different parties, opposed the charge of interest.

Mr. Wetherell, in support of the charge.

THE LORD CHANCELLOR [ELDON]. Where the fund out of which the legacy ought to have been paid is in the hands of the court making

[1] S. C. 2 Bro. C. C. 305.

See *Anon.*, 1 P. Wms. 495 (1718); *Fenwick* v. *Clarke*, 31 L. J. Ch. 728 (1862); *Peterson* v. *Peterson*, L. R. 3 Eq. 111 (1866); *Lupton* v. *Lupton*, 2 Johns. Ch. 614 (1817).

interest, unquestionably interest is due. If a legacy has been erroneously paid to a legatee who has no farther property in the estate, in recalling that payment I apprehend that the rule of the court is not to charge interest; but if the legatee is entitled to another fund making interest in the hands of the court, justice must be done out of his share.

The order directed payment of interest at the rate of 4 per cent. Reg. Lib. A. 1817, fol. 1689.

EX PARTE CHADWIN.

CHANCERY. 1818.

[*Reported* 3 *Swanst.* 380.]

WILLIAM ROE, by his will dated the 11th of January, 1804, and duly executed to pass real estates, after directing that all his just debts, and funeral and testamentary expenses, should be paid out of his real and personal estate, devised and bequeathed to George Chadwin, his brother-in-law, and Thomas Dakin, all his real and personal estate to them, their heirs, &c., upon trust to sell, with a direction that their receipts should be sufficient discharges; and upon farther trust, and he directed his trustees in the first place, to place out at interest the sum of £400, on mortgage or government security, the interest to be paid to the testator's widow half-yearly during her life, in bar of dower; and immediately after her decease he bequeathed the said sum to his nephew William Chadwin; and upon farther trust, out of the residue of the money to arise from the sale of his estate and effects, to discharge all his debts, funeral and testamentary expenses, and the expenses of the trust, and subject thereto, on trust to place out at interest the farther sum of £400 upon mortgage or government security; the annual interest to be paid to his brother John Roe during his life, and immediately after his decease, the said sum to be called in and divided among the children of John Roe equally; and on farther trust out of the residue of the money to arise from the sale, to pay to each of the testator's nephews £100, and to each of his nieces £50, when they should attain twenty-one; and the residue of his estate he gave to his nephew William Chadwin, and appointed George Chadwin and Thomas Dakin executors.

Dakin having renounced probate, the will was proved in March, 1804, by George Chadwin, who sold the testator's estates, and paid his debts and funeral and testamentary expenses; and instead of investing the residue according to the trusts of the will, employed it in trade, and in the purchase of a real estate for his own benefit. Interest on the sum of £400 was paid to the testator's widow to the 25th of March, 1812,

and interest on the like sum was paid to the testator's brother, John Roe, to the same time; and two of the testator's nieces received the legacies bequeathed to them.

In July, 1811, a commission of bankrupt was issued against George Chadwin, the executor.

Soon after the bankruptcy, William Chadwin, the nephew and residuary legatee of the testator, presented a petition, on which an order, dated the 15th of April, 1813, was made, directing a reference to the commissioners to take an account of the assets of the testator possessed by the bankrupt, and how he had applied and disposed thereof, and what remained due from him on account thereof at the time of the bankruptcy, and the petitioner was to be at liberty to prove such sum as should be found due upon the account directed; and it was ordered that the assignees should pay the respective dividends which should be declared upon the amount of such proof (the amount of such respective dividends so to be paid from time to time, to be verified by affidavit), into the bank, with the privity of the accountant-general of the Court of Chancery, in trust in this matter, to be placed to the account of the personal estate of the testator, subject to farther order; with liberty for the petitioner and all other parties interested under the said testator's will, to apply as they should be advised; and it was ordered that the costs of the application should be paid to the petitioner.

By virtue of this order the petitioner proved a debt of £3,185 5*s*. 11*d*. under the commission; and two dividends thereon, amounting to £1,313 18*s*. 7*d*., were paid into the bank.

William Chadwin then presented another petition, stating that the testator's widow and her second husband had assigned to him her interest in the sum of £400; that the testator's brother, John Roe, was still living, having four children, three of whom were infants; that Thomas Roe, another brother of the testator, was also living, having one child, an infant; that the petitioner was the eldest son of Elizabeth Chadwin, the sister of the testator, who had five other children, the testator having no other brother or sister; and that the petitioner had thus become entitled to the present interest in the whole of the legacy of £400, and also to the legacy of £100, as one of the testator's nephews, and to all the residue of the testator's estate after payment of his debts and legacies; and submitting that the legacy of £400 was by the will a primary charge on the produce of the sale of the testator's estates, and that the petitioner was entitled to be paid the same in full, out of the sum of £1,313 18*s*. 7*d*.

The petition prayed, a declaration that the petitioner was entitled to be paid the legacy of £400, with interest, from the 25th of March, 1812, in full, and payment thereof, out of the sum of £1,313 18*s*. 7*d*., and an account of what was due to him for principal and interest, and payment of the residue of that sum among the petitioner and the other legatees, according to their several priorities, in part satisfaction of their legacies;

or, if the Lord Chancellor should be of opinion that the petitioner was not entitled to be paid the sum of £400 in full, then that an account might be taken of the clear amount of the testator's estate at the time of his death, and of the amount of the clear residue that would have remained of that estate, after paying all his debts, funeral and testamentary expenses and legacies, if the same had in fact been paid, and that the several legacies given by the will, and the amount of the said residue, might be ordered to abate proportionally; and that the sum of £1,313 18*s.* 7*d.* might be apportioned among the petitioner and the several other legatees, in proportion to the amount of their several legacies, and of the said residue.

The master, on another petition by the same petitioner, having reported that all the debts of the testator were paid, in March, 1817, William Chadwin presented a farther petition, praying the confirmation of that report, and that the original petition might be farther heard.

The case was argued by *Sir Samuel Romilly* and *Mr. Stephen*, *Mr. Horne*, and *Mr. Rose*.

The cases cited were *Dyose* v. *Dyose*, 1 P. W. 305; *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 472; and *Humphreys* v. *Humphreys*, 2 Cox, 184.

THE LORD CHANCELLOR [ELDON]. This petition prays payment, not out of the testator's estate, but out of dividends declared on the amount due to the testator's estate from the party who has become bankrupt, and claims a proportionate abatement among the pecuniary legatees and the residuary legatee.

The first part of this petition, which prays that the legacy of £400, the entire interest in which the petitioner has acquired by assignment from the testator's widow, may be paid in full, preferably to all the other legacies, is founded on the passage in the will, directing the trustees, "in the first place," to invest that sum; and on the expressions which precede the subsequent bequests, "upon further trust, out of the residue of the money," to pay debts and funeral and testamentary expenses, and "subject thereto and on trust," to invest other sums; and it was insisted in the argument, that these expressions manifest an anxiety in the testator, that the sum to be invested for the benefit of his wife should have priority even over the payment of his debts. Each legacy in succession is given out of the residue; which, it has been properly contended, means what remains after the prior application of the fund.

Under the ulterior bequests infants are interested, and a considerable question arises how far their rights can be bound by an order on a petition in the bankruptcy of the executor; such an arrangement may be beneficial to them, but it appears to me that it can hardly be said that the court can so bind them. The question, whether by reason of the deficiency of the estate, not only the pecuniary legatees should abate among themselves, but a computation should be made of what would be coming to the residuary legatee, and he should be considered on the footing of a pecuniary legatee to that amount, and an abatement

be made among them all, is extremely difficult, and ought to be made the subject of a bill, did not the small amount of the fund render it advisable to obtain a decision in this way, rather than to institute a suit, which would absorb the estate.

If there had been assets for payment of all the legacies no question could have arisen; the residuary legatee could not in that character have objected to the payment of the antecedent legacies, but must have been content with whatever might happen to be the residue, and while there was sufficient to satisfy the pecuniary legacies, there would have been no reason for discussing their priorities.

A question might have arisen involving no consideration of the consequences of the *devastavit* which has been committed. Supposing the testator's estate insufficient to satisfy all the legacies, the question would then have been, the funds left by the testator not being adequate to pay all that he intended to be paid, did he intend that the first mentioned sum of £400 should be paid in priority to all the rest, and each of the successive legacies in priority to those which follow it? But the case which I have supposed differs entirely from the present, assuming an estate unaffected by *devastavit*, and to be distributed according to the effect of the testator's will; whereas, in the events that have occurred, the executor instead of applying himself to the due administration of the testator's estate, paying the legacies according to their priorities, if there were priorities, and making proper investments, paid interest to the testator's widow, and to one of his brothers; and that sort of transaction introduces another question not touched by any prior decision, whether the legatees have not so dealt with this executor in regard to their respective legacies, as to have made him their debtor for each respectively; and whether the proper proof under the commission would not have been, not one entire proof, but subdivided proof for the respective legacies?

Assuming that in this case the latter ingredient is not to be regarded, the court is to consider what the law is where, there being both pecuniary legatees without priorities among themselves, and a residuary legatee, and by reason of the *devastavit* of the executor, the estate having become insufficient to pay all the pecuniary legacies, the residuary legatee insists that the estate at the death of the testator being sufficient, and there then being a residue of £2,000 or £3,000, he is entitled to rank as a legatee of that sum, and to represent that the executor being a debtor to the aggregate body of legatees, he is to be considered a creditor for the residue?

In the first case cited, *Dyose* v. *Dyose*, 1 P. W. 305, Lord Cowper in the instance of deficiency by a *devastavit*, held that he was bound to consider the residuary legatee as entitled to something, if the state of the assets at the death of the testator left a residue; and that the wreck of the estate which could be recovered after the *devastavit*, was divisible not among the pecuniary legatees alone, but among all the legatees according to the proportion of their legacies, and allowing the

residuary legatee to claim as a legatee of the amount of the residue as it stood at the death of the testator.

That case came under the consideration of Lord Thurlow in *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 472, see p. 478, where the principal question related to the admissibility of parol evidence; and adverting to the argument which had been deduced from Lord Cowper's decision, Lord Thurlow declared that he could not agree to the law of that case, and deprecated the doctrine, that whenever a testator gives a residue he is to be understood as intending to leave a residue.

In *Humphreys* v. *Humphreys*, 2 Cox, 184, Lord Thurlow did not content himself with expressing disapprobation of the doctrine in *Dyose* v. *Dyose*, but seems to me to have decided against it; for in that case the residue had been diminished, not by the act of the executor after the death of the testator, but by the act of the testator alone; and Lord Thurlow remarks, that if the inference there attempted to be drawn from Lord Cowper's decree were correct, the inquiry into the state of the assets should have referred to the date of the will, and not to the death of the testator.

Lord Thurlow may, therefore, be considered as having condemned the decision in *Dyose* v. *Dyose*;[1] and if there were no question in the present case but this, whether the residuary legatee can come in competition with the pecuniary legatees, Lord Thurlow's authority would be opposed to the claim of the residuary legatee.

A case in which after the death of the testator, the executor deals with the property as he thinks fit, there being no accession to that dealing on the part of those for whom he is trustee, is widely different from the present case, in which those who might every day have made demands on the executor, have dealt with him as a person having in his hands so much of their money, and have from time to time received from him interest on various sums to which they are respectively entitled. Such transactions give rise to a question which requires much consideration, whether the legatees have not thereby made the executor severally their debtor. If the testator's widow, whom the petitioner by her assignment represents, had required the executor in the first place to separate the £400 from the bulk of the assets, and invest it in a mortgage, and that course had been adopted, no question could have arisen between the first legatee and the rest, on the effect of the *devastavit*. Instead of that, the executor is permitted by the widow and the other legatees, to retain the legacies, paying interest for them; and the question then arises, whether, supposing Lord Thurlow right, these supervening circumstances in the conduct of the respective legatees vary the case, and lay a ground for the doctrine of *Dyose* v. *Dyose*, not on the reasoning there suggested, but on the principle that the widow and the adult legatee having received interest on their legacies, and the residuary legatee having

[1] Lord Thurlow's condemnation of that case has been approved by Sir William Grant, *Page* v. *Leapingwell*, 18 Ves. 466. — REP.

been entitled to receive the fruits of his legacy, if there were any, a mixed case exists, which renders it reasonable to declare that this sum of £1,300 shall be divided among the legatees, as the £3,000 would have been divisible if the executor were solvent? Whether it is not most just to hold that there is an end of the will as to priorities, and that arrangements having been made by all the legatees, the fund in the hands of the executors is applicable for the benefit of all according to those arrangements, as they may be considered to have rendered the executor the debtor of each of the legatees separately?

After anxious and frequent consideration, I know no better view of this case. If the parties are content with it, I venture to say that it is for the benefit of the infants that it should be so considered; but if the parties are not content, I ought not to be satisfied, feeling that this is as difficult a case as I ever had to deal with; and I must put them to file a bill.

Mr. Cullen (*amicus curiæ*) observed, that the proof represented the testator's estate, and that the total was augmented by the amount to which the residuary legatee was entitled.

The Lord Chancellor. I am of opinion that the residuary legatee ought to be considered a creditor for the amount of residue at the death of the testator. This view of the case admits him on a principle different from that adopted in *Dyose* v. *Dyose*, and excludes him from priority in respect of the £400.

DAVIES *v.* BUSH.

Exchequer. In Equity. 1831.

[*Reported Younge*, 341.]

In this case the testator had by his will bequeathed a legacy to a person, between whom and himself accounts had subsisted for some time, on condition of his executing to the testator's executors a general release of all claims and demands which the legatee had on the testator.

The Master, in taking the accounts of the testator's estate, under the decree in the cause, reported, that the legatee had, in compliance with the directions of the will, executed a release to the executors of all claims and demands on the testator and his estate. It did not appear, however, in point of fact, whether the legatee had any legal claim or demand on the testator.

On the taking of the accounts it appeared that the assets were insufficient for the payment of all the legacies, and a question was raised, whether this particular legatee was by the execution of the release a purchaser of his legacy, and entitled to be paid in preference to the other legatees; or whether he was bound to abate ratably with them.

Mr. Temple, for the legatee.

Mr. Jervis and *Mr. Simpkinson*, for the other legatees.

Lord Lyndhurst, L. C. B. I am of opinion that, if there was not a debt actually due to the legatee, the legatee cannot be considered as a purchaser of the legacy, so as to avoid an abatement with the other legatees; and the question is, therefore, whether it is worth while to take a reference as to the existence of the debt. If no debt were due, and the release was required merely for the sake of peace, then, unquestionably, the legatee cannot be treated as a purchaser. If any debt were really due, then I am inclined to think that the present comes within the principle of those cases which have been cited. I do not agree with the construction put on the clause in the will; but it is quite consistent for the testator to have required the release for the sake of peace, and not in respect of any debt actually due.[1]

SECTION V.

TIME OF PAYMENT.

NEWMAN *v.* BATESON.

Chancery. 1786.

[*Reported* 3 *Swanst.* 689.]

A sum of £20,000 was given by the testator Newman to his natural daughter, with directions that so much of the interest should be applied in her maintenance as his executors should think proper.

The Master of the Rolls [Sir Lloyd Kenyon], for the Lord Chancellor, said, that although the daughter was a natural child, yet the testator, having given maintenance expressly to her, it came within the common rule of a legacy given to a child, and directed interest from the time of the testator's death. From Mr. Cox's notes. — Lord Colchester's MSS.

PEARSON *v.* PEARSON.

Chancery in Ireland. 1802.

[*Reported* 1 *Sch. & L.* 10.]

The bill was filed by the executor of Matthew Pearson, to have the trusts of his will carried into execution under the direction of the court.

By this will several pecuniary legacies were bequeathed with directions that they should be paid within a week after the death of the

[1] See *McLean* v. *Robertson*, 126 Mass. 537 (1879); *Duncan* v. *Franklin*, 43 N. J. Eq. 143 (1887).

testator, or in failure thereof that they should bear interest from that time. There followed other legacies to Mrs. Vickers, and to ——— Vickers her son, which were given generally without assigning any time for payment, and the residuum was bequeathed, one half to be divided by the executor between the sons and daughters, grandsons and granddaughters of testator's cousins Roger and Henry Pearson, share and share alike; and the other moiety to his said executor for his own use, subject to make good the other demands created by the will.

The testator died possessed of a considerable personal estate, consisting chiefly of bank stock and Government debentures. One question which arose upon the will was, whether the legacies to Mrs. Vickers and her son bore interest, the personal estate being a productive fund.

Mr. Burne and *Mr. F. W. Greene*, for these legatees, cited *Maxwell* v. *Wettenhall*, 2 P. Wms. 27 (4th point). "If a legacy be given out of a personal estate, consisting of mortgages carrying interest, *or of stocks yielding profits* half yearly, it seems in this case the legacy shall carry interest from the death of the testator."

Mr. Huband and *Mr. Scriven*, on the other side, mentioned the case of *Snell* v. *Dee*, 2 Salk. 415. "If a legacy be devised generally, and no time ascertained for the payment, a year shall be allowed, for so long the Statute of Distribution allows before the distribution be compellable, and so long the executor shall have, that it may appear whether there be any debts. But where a certain legacy is left payable at a day certain, it must be paid with interest from that day." And in *Bilson* v. *Saunders*, Select Cases in Chanc. 72; 2 Eq. Abr. 566, a legacy was left to an infant; the testator had a great deal of money in bank stock, the executor was residuary legatee, and on a bill for the legacy, the question was whether it shall bear interest, and from what time, and the Court of Exchequer agreed that it should only bear interest from a year after the testator's death, for as legacies are to be paid after debts, the executor has that time to inquire, till which time they are not payable, so not to bear interest.

Lord Chancellor [Redesdale]. As to the reason given for the rule mentioned in *Maxwell* v. *Wettenhall*, that the legacy is payable out of a fund which is yielding profits, I take it that makes no difference. In case of a legacy charged upon lands, the land yields profit: but that is not the reason that in such case the legacy bears interest immediately. The rule with respect to legacies out of personal estate is taken from the practice in the ecclesiastical courts where a year is given to the executor to collect the effects, and he cannot be called upon to pay before that time, because he cannot know until then what fund there is to pay; in conformity to this, courts of equity have proceeded, in the case of legacies out of personal estates. But in the case of legacies charged upon lands only, where no day of payment is fixed, interest must be chargeable from the death of the testator or not at all.

Nothing can be more settled than that a man's saying, "I direct all my stock to be applied to the payment of legacies," will not make those

legacies bear interest one moment sooner than they otherwise would: whether the fund bears interest or not is totally immaterial in the case of pecuniary legacies; I remember a case of *Greening* v. *Barker*, where the fund did not come to be disposable for the payment of legacies till near forty years after the death of the testator, and yet the legacies were held to bear interest from the year after testator's death, and the court there was of opinion, that it was a general settled and fixed rule, that pecuniary legacies bear interest from the expiration of twelve months, if there should at any time be a fund for the payment of them, and that in case the fund was productive within the twelve months all the intermediate profits belonged to the residuary legatee. The executor may pay the legacy within the twelve months,[1] but is not compelled to do so: he is not to pay interest for any time within the twelve months, although during that time he may have received interest. But if he has assets he is to pay interest from the end of the twelve months, whether the assets have been productive or not.[2]

LOWNDES *v.* LOWNDES.

EXCHEQUER. IN EQUITY. 1808.

[*Reported* 15 *Ves.* 301.]

WILLIAM LOWNDES by his will, dated the 3d May, 1805, gave and bequeathed to trustees the sum of £20,000 sterling; upon trust to lay it out with consent of his wife and daughter at interest in Government or real securities, and from time to time during the life of Elizabeth his wife, and when and as and after the interest, dividends, or annual produce, of the said trust moneys should become due and payable, to pay to the said Elizabeth his wife; and from and after the death of Elizabeth his wife, in trust from time to time, after the same interest, dividends, and annual produce, should become due, to pay to his daughter for life; with a power of appointment to his daughter. After disposing of the £20,000 in several events which never occurred, the will proceeded thus: —

"I give and bequeath to my said daughter Elizabeth Lowndes and

[1] "I know of no case which prevents executors, if they choose, from paying legacies, or handing over the residue within the year, and if it is clear, *currente anno*, that the fund for the payment of debts and legacies is sufficient, there can be no inconvenience in so doing." — *Per* LORD ELDON, C., in *Angerstein* v. *Martin*, T. & R. 232, 241 (1823). So *held*, in *Sullivan* v. *Winthrop*, 1 Sumn. 1 (1829).

[2] A part of the case relating to the payment of costs is omitted.

"The direction to pay as soon as possible does not enable me to say, the executors ought to have paid upon the very day after the testator's death; nor that there was any precise day, upon which they ought to have paid it." — *Per* SIR WILLIAM GRANT, M. R., in *Webster* v. *Hale*, 8 Ves. 410, 415 (1803). See also *Benson* v. *Maude*, 6 Mad. 15 (1821).

to Thomas Lowndes, their executors, &c., the sum of £3,000 sterling upon trust that they the said Elizabeth Lowndes and Thomas Lowndes and the survivor shall lay out and invest the same at interest in Government or real security and shall from time to time during the natural life of William Hook and when or after the dividends, interest, or yearly income of the said last-mentioned moneys should become due and payable, pay the same dividends, interest, and income into the proper hands of the said William Hook for his support and maintenance, so and in such manner that he may not effectually anticipate, assign, charge, or encumber the growing payments thereof."

After the death of William Hook the testator bequeathed the stock upon other trusts, subject to a power of appointment to William Hook amongst his children. The testator also bequeathed in the same terms two other sums of £3,000 each to two other children of the name of Hook. The three legatees of that name were his natural children, and were infants at the time of his death. He also gave some small annuities: the first payment to begin and be made at the end of three calendar months next after his decease.

The testator died on the 5th of December, 1806; leaving his wife Elizabeth Lowndes and his daughter Elizabeth Lowndes surviving.

Elizabeth Lowndes, the widow, died in February, 1807, intestate; and Elizabeth Lowndes, the daughter, was her administratrix.

It did not appear in the cause that Elizabeth Lowndes the widow had any other provision than that arising from the £20,000, bequeathed to her by the will; and the infants, the Hooks, were wholly unprovided for except by the will.

The only questions discussed were, whether the widow was entitled to interest upon the £20,000 from the death of the testator; and whether the Hooks, the infant natural children of the testator, were also entitled to interest from the death upon their legacies.

The widow lived only two months after the testator: but it was insisted, that, if interest on the £20,000 began to run from the death of the testator in favor of the widow, it would continue in favor of the daughter, the next taker for life, notwithstanding she had other provisions under the will.

The cases cited were *Beckford* v. *Tobin*, 1 Ves. 308; *Cricket* v. *Dolby*, 3 Ves. 10; *Gibson* v. *Bott*, 7 Ves. 89, and *Spurway* v. *Glyn*, 9 Ves. 483.

At the hearing the court inclined against giving interest from the death of the testator in either case; and *Baron Thompson* observed, that in the latter part of the will the testator gives some annuities; and directs, that the payment shall begin at the end of three months from the death; and observed further, that, to support the claim of interest upon the £20,000, it must be argued, that the daughter Elizabeth Lowndes, who was adult, would be immediately entitled to interest from the death of the testator, if Elizabeth Lowndes, the mother, had died in the testator's life.

The Lord Chief Baron delivered the opinion of the court.

We have taken this case into consideration not so much from any difficulty we entertained upon it, as out of respect to the opinion of Lord Alvanley in *Cricket* v. *Dolby*, 3 Ves. 12, 16; see the notes. The point, raised as to the £20,000, is, whether interest is to be given to the wife immediately from the death of the testator. In respect to a child, it is clear, interest should be given from the death of the testator: not so much from the near connection with him as from the imbecility of the child. The law cannot make nice distinctions as to the ages of infants; and considers all under twenty-one as equally incapable of providing for themselves. Very different is the case of the wife. Lord Alvanley threw out an opinion in favor of the wife; but in the very same sentence said, he knew of no case so decided. In the absence of any authority to support us in giving interest to the wife from the death of the testator our opinion is, that we are not authorized to decree it.

With respect to the natural children, it is clear, that by law they are strangers to the testator. In *Beckford* v. *Tobin* Lord Hardwicke conceived, that the testator, by directing maintenance out of the interest, intended that interest should be given from the death. But in this case there is no scintilla of intention to be collected from the will; as there was there from the codicil.

It is plain, that the particular words, used in this bequest, were to mark his intention, that the fund should not be alienated.

Upon the whole, therefore, we are of opinion, that neither the widow nor the daughter are entitled to interest on the £20,000 from the testator's death; and also, that the natural children are not entitled to interest from his death.[1]

RAVEN *v.* WAITE.

Chancery. 1818.

[*Reported* 1 *Swanst.* 553.]

Frances Raven having, in 1809, exhibited articles of the peace against her husband John Raven, he executed a deed of separation, by which some property of the wife, producing a small annual income, was conveyed in trust for her separate use, she agreeing to take upon herself the maintenance and education of her six infant children by her husband. From the date of the deed, the husband and wife had continued to live apart, the husband neither contributing, nor being in

[1] In *Stent* v. *Robinson*, 12 Ves. 461 (1806), and *Acquackanonk Church* v. *Ackerman*, Saxt. 40 (1830), it was *held*, in accordance with the principal case, that a legacy to the testator's widow did not carry interest from his death. In the latter case the legacy was in lieu of dower. *Pollard* v. *Pollard*, 1 Allen, 490 (1861), is *contra*.

circumstances to contribute towards the maintenance of his wife and children. The wife being unable to provide for their support, Josiah North, the husband's uncle, assisted her by the advance of several sums; and about the 1st of November, 1809, fixed his voluntary allowance to her at £60 a year, which he paid quarterly till his death, on the 5th of November, 1815.

By his will, dated the 2d of April, 1810, Josiah North bequeathed to each of the children of his nephew John Raven, who should be living at the testator's decease, £300, to be paid as they respectively attained the age of twenty-one years; directing, that in case any of them should die under that age, unmarried and without issue, their shares should sink into the residuum of his personal estate; the testator then bequeathed to John Waite, John Day, and Robert Day (his executors and devisees in trust), £1,600 upon trust, to place the same at interest on Government or real security, and to pay and apply the interest and proceeds, from time to time, as the same should become due, for the maintenance and support of Frances Raven, and the maintenance, education, and bringing up of all and every her children, until the youngest of them should attain his or her age of twenty-one years; and from that event, to pay the interest of the said sum of £1,600 to Frances Raven, during such part of her life as she should remain the wife of the said John Raven, for her own sole and separate use, and he directed that her husband should not intermeddle therewith, neither should the same be subject to his debts, control, or engagements, and that her receipt should be a sufficient discharge to his trustees; and in case of the death of John Raven, he directed his trustees to pay the interest to Frances Raven during such part of her life as she should continue his widow, but in case she should die during the life of her husband, or in case of his death before her, should intermarry with any other person, then he directed that his trustees, and the survivor of them, his executors, &c., should take the said children under their sole care and management (as it was his express will that John Raven should not receive any benefit arising from the sum of £1,600), and apply the interest thereof towards the maintenance, education, and bringing up of all and every the said children, until the youngest of them should attain the age of twenty-one years; and when the youngest should have attained that age, he directed that the said principal sum of £1,600, and the interest then due thereon (in case Frances Raven should be then dead or married again), should sink into the residuum of his personal estate for the benefit of the persons entitled thereto. The testator also bequeathed to John Raven an annuity of £20 for his life, and to other persons various annuities, with directions for their commencement from the first quarter-day ensuing his death.

The bill filed in behalf of Frances Raven (by her next friend) against the executors of North, prayed a declaration that she was entitled to the interest on the sum of £1,600 from the testator's death, and payment accordingly.

Mr. Bell and *Mr. Barber*, for the plaintiff.

Mr. Fonblanque and *Mr. Blenman*, for the defendants.

THE MASTER OF THE ROLLS. [SIR THOMAS PLUMER.] My present impression is, that the plaintiff cannot sustain her claim, either on the language of the will, on principle, or on authority.

The plaintiff, to whom the legacy was primarily given, is adult, a wife separated from her husband, with separate maintenance, the amount of which does not appear, given to her on condition of maintaining her children: her situation in life is not in evidence, whether she is in circumstances to provide for herself; but it appears, that in addition to her separate maintenance, the testator allowed to her an annuity of £60. The question is, whether he intended that interest should commence on this legacy from his death? The undisputed general rule, that a legacy carries interest only from the expiration of a year after the death of the testator, is founded on this reason, that interest is given for non-payment of the legacy when due; and that a legacy for the payment of which no other period is assigned by the will, is not due till the end of the year: but that general rule has exceptions; and however reluctant the court may be to admit them, as productive of litigation, and the difficulty of knowing where to stop, established and authorized exceptions must prevail. The first exception is a specific legacy, an immediate gift of the fund with all its produce. *Barrington* v. *Tristram*, 6 Ves. 345.[1] This legacy is clearly not specific. Another exception, which raises the present question, is, a legacy for the maintenance of the infant children of the testator. The foundations of that exception are, the natural obligation of the parent to provide for his child, and the incompetence of the child to give a discharge for the principal. The court, therefore, concludes that the parent has postponed payment of the principal, in respect only of this inability to give a discharge, and infers an intention that interest shall be paid immediately.

It is unnecessary here to inquire whether the exception has not been extended in favor of children without any very solid ground; but can any authority be found which carries the exception further? All the cases decided are cases of infants. In *Cricket* v. *Dolby*, 3 Ves. 16, the *reasoning* of Lord Alvanley is expressly confined to infants; in *Beckford* v. *Tobin*, 1 Ves. 308, Lord Hardwicke extended the exception to the case of an illegitimate child, founding his decree on the infancy of the legatee; and in *Hill* v. *Hill*, 3 Ves. & Bea. 183, Sir William Grant recognized the authority of *Beckford* v. *Tobin*, upon the point of infancy, and adopted the same principle. In *Lowndes* v. *Lowndes*, 15 Ves. 301, the Court of Exchequer decided, that in the case of illegitimate children infancy will not authorize an exception to the general rule. I own, I do not see the distinction between that case, so far as the Hooks were concerned, and *Beckford* v. *Tobin*;

[1] See *Bristow* v. *Bristow*, 5 Beav. 289 (1842); *Sargent* v. *Sargent*, 103 Mass. 297 (1869).

the declared and principal purpose of the testator was not, as by what I cannot but think a forced construction, the court held, to prevent alienation, but to provide maintenance. There, however, under the circumstances, the court refused to extend the exception to a legacy in favor of an infant; but no case has been produced in which it ever was extended to a legacy in favor of an adult, though cases innumerable must have occurred of legacies to persons aged and decrepit, objects of the testator's bounty during his life.

On what principle could such an exception in favor of adults be founded? On necessity? But it is said, that the circumstances of the legatee are immaterial. On the terms "maintenance and support"? What charm is there in those words? In what instance of an adult legatee have they been held to confer a right to immediate interest? Neither reason nor authority extends the exception to adults. The only instance in which such a doctrine has been countenanced, is the *dictum* of Lord Alvanley in *Cricket* v. *Dolby*, that "a wife would come under the same exception as a child;" but he immediately reduces the authority of that *dictum*, by acknowledging that all his learning and experience had discovered no such case; and suggesting, that it could hardly ever happen that a wife has not some other provision. Lord Alvanley adds, "and that may make a difference in the case of a child;" intimating, that the claim of a wife partially provided for might be distinguished from the claim of a child.

Opposed to the *dictum* of Lord Alvanley thus qualified, is the direct decision on the point by the Court of Exchequer in *Lowndes* v. *Lowndes*, — a decision which was unanimous, and pronounced after having been suspended from a deference to the *dictum* of Lord Alvanley, and for the purpose of maturely considering it. The extension of the exception to an adult is therefore negatived by the latest, or rather the only, decision on the subject. The present is the case of an adult, and an adult partially provided for: the husband of the plaintiff has actually made a provision for her and her children. For anything that appears to the court, she may be in affluent circumstances.

No expression in the will indicates the intention for which the plaintiff contends. The disposition in favor of the annuitants shows that the testator knew how to direct an immediate provision when such was his meaning. Had he entertained that intention in favor of the plaintiff, would he not have declared it, and inserted a direction for the payment of interest from his death?

It is then insisted, that this is a provision for the joint benefit of an adult parent and her infant children; and that the exception in favor of the infants must prevail. But the gift here is to the mother, to enable her to maintain herself and her children, and the legacy is payable to her during her life; after her death, indeed, the trustees are to apply it for the maintenance of the children, but the mother is the primary

object of the testator's bounty. Such a gift cannot form an exception to the rule.

The only remaining argument is, that if the plaintiff had died in the life of the testator, the children would have been the immediate objects of this bequest. But supposing that the legacy had been given to an affluent individual for life, with remainder to the children, the general rule evidently could not be affected by the death of that individual in the life of the testator. The will must be construed as it stands, not as affected by events; the rule cannot change with subsequent accidents, because it depends on the intent of the testator, — that is, the intent with which the will was written, and according to the state of circumstances at that time.

Neither the principle of the rule, and of the exceptions, therefore, nor the terms of the will, support the plaintiff's claim. I cannot carry the exception beyond the authorities, and introduce a new case in which the rule is to be relaxed.

Bill dismissed; costs to be paid from the residuary estate.[1]

HOUGHTON *v.* FRANKLIN.

CHANCERY. 1823.

[*Reported* 1 *S. & St.* 390.]

ADMIRAL GRAVES made two codicils to his will. In the second codicil was contained the following bequest: —

"I give and bequeath unto Rebecca Houghton and her mother, the sum of £160 per annum, clear of all expenses; they are to be paid £13 6*s.* 8*d.* monthly. In case her mother should die first, the same to be continued to the daughter; provided that she remains single." The testator bequeathed the residue of his personal estate to the defendants, Maria Franklin and Elizabeth Edwards.

The bill was filed by Rebecca Houghton and her mother, for the usual accounts of the testator's personal estate; and to have a sufficient part of the residue appropriated for securing the annuity of £160.

In the course of the cause a question was made as to the time from which the annuity was to commence; and that question now came on to be argued.

Mr. Pemberton for the defendants.

Mr. Heald and *Mr. Swanston*, for the plaintiffs.

THE VICE-CHANCELLOR. [SIR JOHN LEACH.] As a will speaks at the death of a testator, it must be intended that the payment of an annual sum given by it is to commence from that period, unless there be some

[1] See *Sullivan* v. *Winthrop*, 3 Sumn. 1 (1829).

circumstances or expression in the will to control that intention. In this will there is no such circumstance or expression; and I am, therefore, of opinion, that the payment of this annuity ought to commence from the testator's death.[1]

WELSH *v.* BROWN.

SUPREME COURT OF NEW JERSEY. 1881.

[*Reported* 43 *N. J.* 37.]

ON writ of error to Morris Circuit.

Catherine Welsh died on the 22d of April, 1874. By her will, dated April 20th, in the same year, she made to the plaintiff the following bequest: —

"I do give and bequeath to my niece, Aletta Brown, my gold watch, my melodeon, my black earrings, my black furs, one set silver teaspoons (second choice), my cashmere shawl, my brown silk dress, and the interest of twenty-five hundred dollars, to be paid to her annually by my executor; and at her death the said sum of twenty-five hundred dollars shall be paid to or divided equally among any child or children of hers that may then be living, or their heirs; but if the said Aletta Brown shall die leaving no children or grandchildren living, then I do order the said sum of twenty-five hundred dollars divided equally among my heirs. I also give her all my mourning clothing."

She also gave sundry pecuniary legacies and specific legacies of personal property to different legatees, after which the will contained the following provisions: —

"I do order that none of the legacies or interest herein given or bequeathed shall be due or payable during the lifetime of my mother, but that all interest that may accrue or become due on any obligations belonging to my estate shall be used for the comfort and support of my mother; and if said interest is not sufficient, then I do order my executor to pay out of my estate such sum as may become necessary for the support of my said mother and for her burial."

She further orders and directs as follows: "I do order and direct that all taxes that may be levied or assessed on any money or interest herein bequeathed or given away shall first be deducted from the said money, and the balance paid, and said money or interest shall be subject to the taxes as long as it remains in the hands or control of my executor. . . . I do order and direct that, after putting at interest a

[1] "If an annuity is given, the first payment is paid at the end of the year from the death; but if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest of the legacy; and till the legacy is payable, there is no fund to produce interest. I remember, when it was not clear in the case of the annuity; though it is so now certainly." — *Per* LORD ELDON, C., in *Gibson* v. *Bott*, 7 Ves. 89, 96 (1802).

sum sufficient to pay the interest, and paying the legacies herein bequeathed, and after settling my estate, if any balance shall be found due my estate or in the hands of my executor, he shall then divide such sum, share and share alike, among my heirs."

This action was brought by Miss Brown, the legatee, against the executor of the deceased, to recover $175, one year's interest on the said sum of $2,500, accruing between the 22d of April, 1874, and the 22d of April, 1875. The defendant demurred to the declaration, and the question designed to be raised by the demurrer was, whether, under the bequest to the plaintiff, she was entitled to interest on the said sum of $2,500 from the death of the testatrix, or from the expiration of one year from that event.

This question the court below decided in favor of the plaintiff below. Hence this writ of error.

Argued at November Term, 1880, before BEASLEY, Chief Justice, and Justices DEPUE, SCUDDER, and KNAPP.

For the plaintiff in error, *Alfred Mills.*

Contra, *S. B. Ransom.*

The opinion of the court was delivered by

DEPUE, J. In determining as of what time legacies shall take effect and be payable, certain general rules have been adopted; and testators, in making their wills, are considered as framing their testamentary dispositions in view of those general rules.

Specific legacies are treated as severed from the bulk of the testator's property by the operation of the will, and their increase and emolument are regarded as specifically appropriated for the benefit of the legatee from that period; though the time for the enjoyment of the principal may be postponed to a future period. With respect to general legacies, the law, for convenience, has prescribed, as a general rule, that where no time is named by the testator, and in the absence of any intention derived from the will itself, such general legacies shall be raised and satisfied out of the testator's estate at the expiration of one year next after his death. 2 Roper on Leg. 1245; 2 Lead. Cas. in Eq. 639, notes to *Ashburner* v. *MacGuire.* On a legacy coming within the class of general legacies, if the legacy be not paid at the expiration of the year, interest from that time will be allowed as damages; and interest on a legacy will not be computed from a period prior to that time, unless there be a clear expression of intention that interest shall be reckoned from an antecedent time or event. In that case the interest is regarded as of the substance of the gift, and is not recoverable, as such, unless there be a clear intention apparent on the face of the will that interest shall be payable from a period prior to the expiration of the year.

To this general rule there are a few well-established exceptions. A legacy given in satisfaction of a debt will carry interest from the testator's death. *Clark* v. *Sewell*, 3 Atk. 99. Interest on a legacy to a minor child of the testator, or to one to whom the testator is *in loco parentis*, will be allowed from the testator's death as a provision for

maintenance, where no provision is made by will or otherwise for the support of such legatee. *Brinkerhoff* v. *Merselis*, 4 Zab. 680; *Cox* v. *Corkendall*, 2 Beas. 138; *Hennion's Ex'rs* v. *Jacobus*, 12 C. E. Green, 28; *Ex'r of Kearney* v. *Kearney*, 2 C. E. Green, 59, 63, 504. Where the bequest is of an annuity, in the absence of any direction to the contrary, the annuity will commence from the death of the testator, and the first payment become due at the end of the first year from that event. In this respect an annuity differs from a general legacy; for a general legacy, not being payable out of the testator's assets before the end of the year from the testator's death, no interest will be due thereon until the expiration of the second year. 2 Rop. on Leg. 1245.

There is another class of cases which are apparently exceptions to this general rule; but those cases stand upon peculiar and special grounds, and are regarded as a class by themselves. On a bequest of the residue of the testator's estate, or of some aliquot part or proportion thereof, in trust to pay the interest or income to a legatee for life, with a gift of the principal over at his death, the interest or income payable to the life tenant will be computed from the testator's death. *Green* v. *Green*, 3 Stew. 451; s. c. 5 Stew. 768; *Van Blarcom* v. *Dager*, 4 Stew. 783; 2 Spence's Eq. Jur. 552–569; *Howe* v. *Earl of Dartmouth*, 7 Ves. 137, and the notes to that case in 2 Lead. Cas. in Eq. 686 *et seq.* Cases of this class are distinguished from legacies of a definite sum with remainder over, with respect to the computation of interest to the life tenant. 2 Wms. on Ex'rs, 1391; *Fearns* v. *Young*, 9 Ves. 549, *per* Lord Eldon; *Baker* v. *Baker*, 6 H. of L. Cas. 623, *per* Lord Chelmsford; *Van Blarcom* v. *Dager*, 4 Stew. 783, *per* Dodd, J. In the case last cited, the computation from the testator's death of interest or income to the life tenant, where the gift is of the residue, is placed on a special equity as between the parties who are to participate in the gift, arising from the injustice that would be done to the life tenant by the addition of the entire interest to the capital. 2 Rop. on Leg. 1320. That the computation of interest as between the life-tenant and remainder-man, where the *corpus* of the gift is the residue of the testator's estate, is founded exclusively on the special equity between the parties among whom the gift is to be apportioned, is apparent from an examination of the cases. For the first year, sometimes, the interest on the whole income is allowed the life tenant; sometimes only a portion of the income for the first year is allotted to the life tenant, and the balance is added to increase the capital, for the reason that, in such cases, the circumstances are such that it would be inequitable to the remainder-man to give the whole produce of the first year to the life tenant; and sometimes the allowance to the life tenant for the first year is upon a *percentage* determined by the court, on a consideration of what would be just and equitable as between the parties, under the circumstances of the particular case. *Hewitt* v. *Morris*, 1 Turn. & Russ. 241; *Fearns* v. *Young*, 9 Ves. 552; *Brown* v. *Gellatly*, L. R. 2 Ch. App. 751; 2 Spence's Eq. Jur. 558, *et seq.*

The apparent conflict in the decisions on this subject is in a large measure due to the failure to observe the special grounds on which the computation of interest is made as between the life tenant and remainder-man, where the *corpus* of the gift is the residue of the testator's estate. Some of it is also attributable to expressions used in that class of cases where interest is allowed by way of maintenance for minor children, or those to whom the testator is *in loco parentis*. If those cases which are universally considered as exceptional, and as resting on special and peculiar grounds, are put aside, the decisions on the subject of interest on legacies are quite consistent and harmonious.

The contention upon which the judgment below is sought to be sustained is, that the gift to Miss Brown is of an annuity, and that the intention of the testatrix to pay her interest from her death is to be deduced from the language of the bequest.

An annuity is defined to be a yearly payment of a certain sum of money. 2 Wms. on Ex'rs, 809; *Booth* v. *Ammerman*, 4 Bradf. Sur. R. 129. The first payment of an annuity given by will is due at the end of one year from the testator's death. This is one of the exceptions to the general rule with respect to the enjoyment by a life tenant of the benefits given by will. Where a general legacy is given to one for life, with remainder over to another, no interest will be due until the expiration of the second year. 2 Rop. on Leg. 1253. This distinction between an annuity and a legacy for life with remainder over, was taken by Lord Eldon in *Gibson* v. *Bott*, 7 Ves. 89, 96. His language is: "If an annuity is given, the first payment is paid at the end of one year from the death; but if the legacy is given for life, with remainder over, no interest is due till the end of two years; it is only interest on the legacy, and until the legacy is payable there is no fund to produce interest." Mr. Roper approves of this distinction as founded on principle, and, speaking of the disposition of a sum of money and the interest of it given as an annuity to one for life, says that the annuity, being given in the form of interest upon a gross sum of money to be taken out of the assets as any other legacy, cannot be payable sooner than the fund produces the means for that purpose. 2 Rop. on Leg. 877.

In the present case the gift to the plaintiff is of the interest on a gross sum — $2,500 — to be paid to her annually by the executor; and after the plaintiff's death the principal sum is payable to other parties. The will provides that the executor, after putting out at interest a sum sufficient to pay the interest and legacies bequeathed, shall divide the residue among the heirs of the testatrix. It further directs that all taxes on the money or interest bequeathed should first be deducted, and the balance only paid, and that the said money or interest should be subject to the taxes as long as it remained in the hands or under the control of the executor.

In substance the bequest is to the executor to invest and pay over the net income or interest, after deducting taxes, to the life tenant

during her life, and after her death, to pay the entire principal to the legatees in remainder. The executor, in the administration of the estate as executor, was under no obligation to set apart the principal sum on which interest was allowed until the end of the first year; and until that separation was made, there was no fund to produce interest for the life tenant. In legal effect the bequest is analogous to those in *Lowndes* v. *Lowndes*, 15 Ves. 301, and *Raven* v. *Waite*, 1 Swanst. 553, upon which interest was allowed only from the expiration of the year. In my examination of the English cases, I have not found a single decision in which a bequest similar to that under consideration, has been considered as excluded from the general rule that the legacy shall, for such purposes, take effect after the lapse of the year. The distinction between an annuity pure and simple, which is to be paid at all events out of the testator's estate at the expense of the residuary legatee, and the interest or income for life, of a certain sum set apart by the testator for that purpose, and given over in gross to another after the death of the life tenant, has been quite uniformly adhered to. *Baker* v. *Baker*, supra, was decided upon that distinction. Lord Cranworth, in delivering his opinion, said: "In all these cases arising upon the construction of wills, the real question is, whether that which is given is given as an annuity, or is given as the interest of a fund; and where that question is to be considered, what you must look to is this: whether the language of the testator imports that a sum, at all events, is annually to be paid out of his general estate, or only the interest, or a portion of the interest, of a capital sum which is to be set apart." This distinction is recognized by Lord Justice Rolt in *Birch* v. *Shewall*, L. R. 2 Ch. App. 649. The principle on which it rests is that a bequest of a specific sum of money is one gift, one legacy, the benefit of which the testator has apportioned between the donee for life and the remainder-man. To the life tenant he has given the interest or produce of the fund during life, and the capital sum to the remainder-man after the death of the former. Such a legacy is, therefore, subject to the rule that general legacies are to take effect and be payable at the expiration of a year from the testator's death. The executor is not bound to set apart the legacy for investment before the end of the year; and until that be done there is no fund to produce the interest that is payable to the life tenant. In *Knight* v. *Knight*, 2 Sim. & Stu. 490, the bequest was to each of the children of T. W., "as soon as they attain the age of twenty-one years, the sum of £2,000, with interest at the rate of five per cent per annum;" and interest was held to be computable only from the end of the year, for the reason that the executors would not be bound to make an investment for the security of the legatees until the end of the year.

In the courts of this country the weight of authority is in the same direction.

Judge Redfield adopts the same distinction between annuities and accruing interest when made the subject of bequests, with respect to

the time when the bequest becomes operative, as was taken by Lord Eldon in *Gibson* v. *Bott*. He holds that, in case of an annuity bequeathed, it begins from the death of the testator, and the first payment becomes due in one year thereafter; but that, when the interest or net income of a certain sum is given, the interest will not begin to run until one year from the decease of the testator, and the first payment will, consequently, become due in two years from that date. 3 Redfield on Wills, 184, *c.* V., § 25, page 13. In *Lawrence* v. *Embree*, 3 Bradf. Sur. R. 364, a bequest of interest or other income of a certain sum to be invested by executors was held not to begin to carry interest until the end of one year, at which time the investment should be made; and the distinction between an annuity and a bequest of the interest of a specific sum was made the basis of the decision. In the subsequent case of *Booth* v. *Ammerman*, 4 Bradf. Sur. R. 129, the subject received a careful consideration. The bequest under adjudication was to the testator's sister, "of the interest upon fifteen hundred dollars, in case she should become a widow, during her widowhood, payable annually," and the executors were authorized to invest the estate in such sums and upon such terms as they might deem necessary for "the due execution of the will." The testator died in October, 1854, and the legatee became a widow in May, 1855. The question was when the legacy became due, and from what time it bore interest. In delivering his opinion the learned surrogate adopted the distinction laid down by Lord Eldon in *Gibson* v. *Bott*, as a distinction in favor of annuities long recognized in the books. In commenting on the words "the interest," and "payable annually," in answer to the inquiry he propounds, whether it is an annuity or merely an ordinary legacy, he said: "It is not a stated sum, but may be more or less, according to the earnings of the capital; in this respect it does not possess the characteristic of an annuity, but is merely interest or income. It is payable annually; in this respect it possesses a characteristic common alike to an annuity and to interest, but not peculiar to either. In the present case the testator gives 'the interest upon fifteen hundred dollars;' the gift is of interest, and that is the entire substance of the gift. The mode of payment is 'annually,' and that relates to the payment, and not to the gift. The thing given is the profits of a certain portion of the estate, to be separated in money and invested. It is given as interest of a demonstrated capital, and interest cannot, therefore, begin to accrue until the capital becomes due. The provision of the will would, therefore, seem to be satisfied by making the investment at the end of the year, and paying the interest annually to the life tenant. The will expressly provides for this investment, and, on the decease of the legatee, to whom the interest is bequeathed for life, gives the *corpus*, or capital, over. This bequest is substantially a legacy for life with remainder over; and the legacy would not become due so as to draw interest till the end of the year, unless otherwise specially directed. I do not think the direction to pay interest annually sufficient

to take the case out of the general rule." These remarks have been quoted for the reason that they are applicable to the bequest under consideration, and, in my judgment, are a correct exposition of the law on the subject. In that case the direction was that the bequest should take effect in case the legatee "should become a widow." She became a widow within the year. The surrogate regarded that language as prescribing a condition or contingency on the happening of which the legacy became due, and gave interest from the happening of her widowhood, and denied that the words "payable annually" amounted to such a special direction as would carry interest from the testator's death.

In *Cogswell* v. *Cogswell*, 2 Edw. Ch. 230, under a direction that executors should invest in stock a sum of money which would produce an annual income of $1,000, and to permit testator's wife to take such income from time to time as the same should become payable, the executors were allowed one year to make the investment.

An examination of the cases which are usually cited as holding a different principle will disclose the fact that, with a few exceptions, they are cases coming within some one of the exceptions above stated to the general rule.

In *Williamson* v. *Williamson*, 6 Paige, 298, the bequest was of the interest or income of the residuary estate to the legatee for life. In *Craig* v. *Craig*, 3 Barb. Ch. 76, one of the bequests was in the form of a direction for the investment of such a sum as would produce in legal interest $500 per annum, as a provision for the testator's lunatic son, which should give him "a sure and ample support during his life;" the other was of an annuity of $1,000 per year to the testator's wife, the principal to be invested as she might reasonably require. In *Cook* v. *Meeker*, 36 N. Y. 15, the legatees for life were the wife, daughter, and grandchildren of the testator, and their legacies were considered as intended to provide a fund for their support and maintenance. *In re Devlin's Estate*, 1 Tucker, 460, the legatees were children without any other means of support, and the case was expressly decided upon the distinction between interest upon a sum of money left as a legacy, and an annuity or income bequeathed for the support of the legatee. In *Swett* v. *Boston*, 18 Pick. 123, the gift to the legatee was of the interest of $50,000 from the time of the testator's decease during the life of the legatee. In *Brimblecom* v. *Haven*, 12 Cush. 511, the bequest was "of the interest of $6,000," without any gift over of the principal sum: and the court held that, there being no setting apart of any fund to answer the legacy, it was, in effect, the gift of an annuity of a fixed sum of money annually, fixed and expressed by the term "interest of $6,000." The two cases cited from the courts of Pennsylvania (*Eyre* v. *Golden*, 5 Binn. 472, and *In re Hilliard's Estate*, 5 Watts & Serg. 30) may be considered as direct authorities in favor of the view adopted by the court below. But these cases, if they do not stand alone, are contrary to the great weight of authority, and are against correct principles.

The decisions in the courts of this State on this subject have adopted and followed the law as laid down by Lord Eldon and by Mr. Roper.

In *Halsted* v. *Meeker*, *Ex'r*, 3 C. E. Green, 136, upon a direction in the testator's will that executors should place the sum of $20,000 at interest, and pay the net income or interest thereof, semi-annually to the testator's daughter, Chancellor Zabriskie held that the executors were required to invest at the end of the year, and that the legatee was entitled to the interest which should accrue from that time. In *Henion's Ex'rs* v. *Jacobus*, 12 C. E. Green, 28, the bequest was to the testator's daughter, of the legal interest of $1,400, to be paid to her annually, and the principal at her death to be divided among her heirs; Chancellor Runyon held that the interest payable to the testator's daughter was to be computed from the end of one year from the testator's death. The same rule was re-affirmed and applied in *Howard* v. *Francis*, 3 Stew. 444. These cases from the Court of Chancery were cited with apparent approval in *Van Blarcom* v. *Dager*, 4 Stew. 495. They are decisions of a court of co-ordinate jurisdiction, and ought not to be disregarded or overruled except for the most cogent reasons. They apply directly to this case, and in my judgment were correctly decided.

I think that for the reason already given, the judgment should be reversed.

It may be remarked that, on a ground that may be technical, and was not taken on the argument, the same result would be reached. The testatrix directs that none of the legacies or interest given or bequeathed, shall be due or payable during the lifetime of her mother. A copy of the will is annexed to the declaration, and by averment, made part of it; and the death of the mother of the testatrix is nowhere averred in the pleading.

Judgment reversed.[1]

[1] The law seems to be settled otherwise in Pennsylvania. *Townsend's Appeal*, 106 Pa. 268 (1884). See, also, *Ayer* v. *Ayer*, 128 Mass. 575.

NOTE. — "Where the court decrees a legacy to be a satisfaction of a debt, the court gives interest always from the death of the testator." — *Per* LORD HARDWICKE, C., in *Clark* v. *Sewell*, 3 Atk. 96, 99 (1744).

The running of interest on a legacy "to be paid out of the money due on" a certain mortgage "when the same shall be recovered," does not depend upon the time when the money is recovered. *Wood* v. *Penoyre*, 13 Ves. 325 (1807). See, also, *Brooke* v. *Lewis*, 6 Mad. 358 (1822).

ACTIONS FOR LEGACIES. In England trover will lie for the subject of a specific legacy, after the assent of the executor, *Williams* v. *Lee*, 3 Atk. 223 (1745); but for a specific legacy before assent, or for a pecuniary legacy, no action lies at common law, *Deeks* v. *Strutt*, 5 T. R. 690 (1794).

In several of the United States, an action at law is given for a pecuniary legacy or for a specific legacy before assent. *Colwell* v. *Alger*, 5 Gray, 67 (1855). Sometimes this is by virtue of a Statute, but sometimes without it, e. g., *Knapp* v. *Hanford*, 6 Conn. 170 (1826).

LEGACY TO DEBTOR. Though this takes the form of a release, it is still a legacy, and the debt is assets.

A debt due from a legatee, although barred by the Statute of Limitations, can be set off against a legacy. *Courtenay* v. *Williams*, 3 Hare, 539 (1844). It is otherwise under the Massachusetts Statute. *Allen* v. *Edwards*, 136 Mass. 138 (1883).

RESIDUE. On a gift of the residue for life, with remainder over, the life-tenant is, in general, entitled to the income from the death of the testator, though many nice distinctions exist. See 2 Wms. Exec. (8th ed.), 1396–1402; 2 Woerner, Amer. Law of Adm. § 458.

RIGHT OF EXECUTOR TO RESIDUE. In England, when the testator appointed an executor, and made no disposition of the residue, the executor was entitled to it beneficially; but slight expressions would turn him into a trustee for the next of kin. 2 Wms. Exec. (8th ed.), 1483–1488. Now, by Statute, executors, in such cases, are made trustees. St. 11 Geo. IV. & 1 Wm. IV. *c.* 40. Generally in the United States, sometimes by Statute, sometimes without, executors take the undisposed-of residue as trustees, and not beneficially.

CHAPTER XI.

DISTRIBUTION.

St. 22 & 23 Car. II. c. 10 (1670). *An Act for the better settling of intestates' estates.* Be it enacted by the king's most excellent majesty, with the advice and consent of the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the authority of the same, that all ordinaries, as well the judges of the prerogative courts of Canterbury and York for the time being, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may upon their respective granting and committing of administration of the goods of persons dying intestate, after the first day of June one thousand six hundred seventy and one, of the respective person or persons to whom any administration is to be committed, take sufficient bonds with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following, *mutatis mutandis*, viz. : —

II. The condition of this obligation is such, that if the within bounden A. B. administrator of all and singular the goods, chattels and credits of C. D. deceased, do make or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hands, possession or knowledge of him the said A. B. or into the hands and possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the registry of court, at or before the day of next ensuing; (2) and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased at the time of his death, which at any time after shall come to the hands or possession of the said A. B. or into the hands and possession of any other person or persons for him, do well and truly administer according to law; (3) and further do make or cause to be made, a true and just account of his said administration, at or before the day of . And all the rest and residue of the said goods, chattels and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the judge or judges for the time being of the said court, shall deliver and pay unto such person or persons respectively, as the said judge or judges by his or their decree or sentence, pursuant to the true intent and meaning of this Act, shall limit and appoint. (4) And if it shall hereafter appear, that any last will and testament was made

by the said deceased, and the executor or executors therein named do exhibit the same into the said court, making request to have it allowed and approved accordingly, if the said A. B. within-bounden, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said court; then this obligation to be void and of none effect, or else to remain in full force and virtue.

III. Which bonds are hereby declared and enacted to be good to all intents and purposes, and pleadable in any courts of justice: (2) and also that the said ordinaries and judges respectively, shall and may, and are enabled to proceed and call such administrators to account, for and touching the goods of any person dying intestate; (3) and upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear (after all debts, funerals and just expenses of every sort first allowed and deducted) amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks *pro suo cuique jure*, according to the laws in such cases, and the rules and limitation hereafter set down; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same, by the due course of his Majesty's ecclesiastical laws: (4) saving to every one, supposing him or themselves aggrieved, right of appeal as was always in such cases used.

IV. Provided, that this Act, or anything herein contained, shall not anyways prejudice or hinder the customs observed within the city of London or within the province of York or other places, having known and received customs peculiar to them, but that the same customs may be observed as formerly; anything herein contained to the contrary notwithstanding.

V. Provided always, and be it enacted by the authority aforesaid, that all ordinaries and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following; that is to say, (2) one third part of the said surplusage to the wife of the intestate, and all the residue by equal portions, to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir at law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made: (3) and in case any child, other than the heir at law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate, to be distributed

to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated: (4) but the heir at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent, or otherwise from the intestate.

VI. And in case there be no children nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree and those who legally represent them.

VII. Provided, that there be no representations admitted among collaterals after brothers' and sisters' children: (2) and in case there be no wife, then all the said estate to be distributed equally to and amongst the children: (3) and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever.

VIII. Provided also, and be it likewise enacted by the authority aforesaid, to the end that a due regard be had to creditors, that no such distribution of the goods of any person dying intestate be made till after one year be fully expired after the intestate's death; (2) and that such and every one to whom any distribution and share shall be allotted, shall give bond with sufficient sureties in the said courts, that if any debt or debts truly owing to the intestate shall be afterwards sued for and recovered, or otherwise duly made to appear; that then and in every such case he or she shall respectively refund and pay back to the administrator his or her ratable part of that debt or debts, and of the costs of suit and charges of the administrator by reason of such debt, out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said debt or debts so discovered after the distribution made as aforesaid.

IX. Provided always, and be it enacted by the authority aforesaid, that in all cases where the ordinary hath used heretofore to grant administration *cum testamento annexo*, he shall continue so to do, and the will of the deceased in such testament expressed shall be performed and observed in such manner as it should have been if this Act had never been made.

· St. 1 Jac. II. c. 17, § 7 (1685). Provided also, and it is further enacted by the authority aforesaid, that if after the death of a father, any of his children shall die intestate without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her; anything in the last-mentioned Acts to the contrary notwithstanding.

MAW *v.* HARDING.

CHANCERY. 1691.

[*Reported* 2 *Vern.* 233.]

ON the Statute for the better settling of intestates' estates, the question was on that clause of the Statute, that there should be no representation among collaterals, beyond brothers' and sisters' children. Whether to be intended of brothers and sisters to the intestate, or whether, when distribution falls out amongst brothers and sisters, though remote relations to the intestate, representation shall be admitted.

PER CURIAM. No representation but between brothers and sisters to the intestate.

WALSH *v.* WALSH.

CHANCERY. 1695.

[*Reported Prec. Ch.* 54.]

A. HAS three brothers, one dies, leaving three children, another two, and the third five, then A. dies intestate; and *per* LORD KEEPER [SIR JOHN SOMERS] on time taken to consider of this case, distribution shall be *per capita* and not *per stirpes;* and that all the children should have equal, because none take by way of representation, but all as next of kin in equal degree.

CART *v.* REEVES.

CHANCERY. 1718.

[*Reported* 2 *Eq. Cas. Abr.* 423, *pl.* 7.]

A WIFE died possessed of *choses in action*, and the husband *survived*, and *died without taking out letters of administration to his wife;* after which, *the next of kin of the wife administered to her.* And LORD CHANCELLOR PARKER held, that *the wife's administrator was but a trustee for the executor of the husband*, the *right to the wife's* choses in action *being by the Statute of Distribution vested in the husband as next of kin to the wife;* and whereas there is a proviso in 29 Car. 2, saying, that the Statute of Distribution shall not extend to the estate of *feme coverts* that die intestate, but that their husbands may have administration of their *personal* estate as before the making

the Act, his Lordship said, this clause was made *in favor of the husband*, and *not to his prejudice;* so that it was intended by the Parliament that the husband should be within the Statute of Distribution so as to take the wife's *choses in action* as to his benefit, but should not be within the same as to his prejudice; and that this was not a new point, but had been settled, and upon very good reason; for were the construction to be otherwise, the husband of the wife intestate would be in a worse case than the next of kin, though ever so remote, which was not the intent of the Statute.

DURANT *v.* PRESTWOOD.

CHANCERY. 1738.

[*Reported* 1 *Atk.* 454.]

ANNE PRESTWOOD died intestate, and letters of administration were granted to the plaintiff Frances as her aunt, and one of her next of kin, who would have distributed the personal estate to the intestate's next of kin, according to their interests, without suit; but defendants insisting they are severally entitled to the whole, the bill is brought in order that an account may be taken of the intestate's personal estate, and that the shares of all persons may be ascertained, and the plaintiffs in right of Frances claim one third of the personal estate for their own use.

The defendants Ambrose Rhodes and Elizabeth his wife insisted that in case the plaintiffs, in right of Frances, are entitled to a third, they in right of the defendant Elizabeth are entitled to a like share, she being the plaintiff Frances's only sister.

The defendants Thomas, and Charlotte Anne Prestwood, who are the only children of Thomas Prestwood deceased, who was the only brother to the intestate, insist that they, as representatives of their father, and nearest of kin to the intestate, are entitled to the whole personal estate.

LORD CHANCELLOR [HARDWICKE]. As by our computation the aunts and nephews are in equal degree of relation to the intestate, they are equally entitled under the Statute of Distributions, and no right of representation can be here allowed, and, according to the authority of many cases, they are to take *per capita*, and not *per stirpes*, and therefore his Lordship directed, after the satisfaction of debts, the clear surplus of the intestate's personal estate to be divided into four equal parts, one fourth to the plaintiffs, one fourth to the defendant Thomas Prestwood, one fourth to the defendant Charlotte Anne Prestwood, and the remaining fourth to the defendant Rhodes and Elizabeth his wife.

Horrel v. *White*, in the Court of Exchequer, and *Grainger* v. *Grainger*, before Lord Talbot, were cited.[1]

[1] See, *accord.*, *Lloyd* v. *Tench*, 1 Ves. Sr. 213 (1751).

EVELYN *v.* EVELYN.

CHANCERY. 1753.

[*Reported Ambl.* 191.]

JOHN EVELYN, an infant, died intestate, leaving a brother and a grandfather.

Q. Whether the brother is entitled under the Statute of Distributions to the whole of his personal estate, or it shall be divided equally between the brother and grandfather?

Mr. Attorney-General and *Browning*, for the plaintiff the brother.

Solicitor-General and *Capper*, on the other side.

LORD HARDWICKE, Chancellor, took time to consider of the question; and said, as there were two determinations on the point, he would not hastily overturn them; and ordered copies of the decrees in those cases to be laid before him.

LORD CHANCELLOR HARDWICKE having taken time for his opinion, gave it this day.

Question. Whether the personal estate shall go entirely to his brother? or, whether the defendant, his grandfather, shall share it, as being in equal degree, according to the civil law?

This question has been determined twice on Stat. Car. that the grandfather shall not share.

The first was *Pool* v. *Whishaw*, in Exchequer, in 1708, by the unanimous opinion of all the four Barons. The other was *Norbury* v. *Richards*, 20th November, 1749, before Fortescue, M. R. I am of opinion, the decision in *Pool* v. *Whishaw* was right. I have seen a note of that case by C. B. Warde, and also by C. B. Dod, who was of counsel in it. The latter is a short, but the clearest report of it; and by that it appears, Dr. Lane argued it in the same manner as this case has been argued. The court said there had been no such usage since the Statute to let the grandfather share with the brother; and I have heard of none since.

If it was *res integra*, there are just grounds, both in the law of England and the Roman law, to prefer the brother.

The words of the Statute must be taken together. The words *pro suo cuique jure* will let in any advantage of equality or preference which a person was entitled to by our law before the Statute.

But one degree between brother and brother by our law. *Blackborough* v. *Davis*, 1 Wms. 50; 1 Ventr. 421.

The old Roman law gave the whole to the brother in preference to the grandfather, unless the grandfather on the father's side was let in to share.

Cod. l. 6, tit. 48. the mother was not let in at all. Vin. l. 3, tit. 3, page 3.

Nowhere laid down that the Novels were not received in the western parts of the world; and Dr. Lane, in his argument on that case in the Exchequer, says, they were received, except in particular instances, where the customary law of the place broke in upon them.

By 118 Nov. c. 2, 3: brothers and sisters are let in to share with the father; and Voet in 2 vol. c. 13, 17, proves it absurd from that law, that the grandfather should share with the brothers and sisters of the intestate.

Additional reason from Lord Hale, that brother and brother are but one degree in collateral line.

The general observation, in *Vin. ratio succedendi*, in his Com. 555, quarto edition, is very apposite. He admits a *jus potius;* and if in any case it prevails, it ought to the brother in preference to the grandfather. It is unnatural to carry the personal estate up to the grandfather, who must be long before provided for, and is perhaps going out of life. A contrary determination would produce inconveniences, and might tend to alter many distributions which have been made since 1708, and acquiesced under.[1]

IN RE ROSS'S TRUSTS.

CHANCERY. 1871.

[*Reported L. R.* 13 *Eq.* 286.]

SIR JOHN WICKENS, V. C.[2] The question reserved for judgment in this case is one as to the operation of the Statute of Distributions, where the intestate left grandchildren and great-grandchildren, but no children.

Alexander Ross, by his will, dated the 17th of November, 1819, gave one-fifth of his residuary estate to his daughter Margaret Ross for life, with remainder to her children; and in default, "in trust for the person or persons who, under the Statutes made for the distribution of the estates of intestates, would then be entitled thereto, in case I were then to die possessed thereof and intestate; and to be divided between and among such persons, if more than one, in the proportions in which the same would be divisible by virtue of the same Statutes."

Margaret Ross died on the 8th of June, 1871, unmarried.

The testator died in November, 1819, leaving five children, of whom Margaret was the youngest.

Of these the second and fourth died before 1871 without issue. Alexander, the eldest son, had three children, of whom two survived him in June, 1871; and one died before June, 1871, leaving a daughter still living. William Francis, the third son of the testator, and the only one besides Alexander, who left descendants living in 1871, had

[1] s. c. 3 Atk. 762.

[2] Only the opinion is here given.

four children, viz., William, who died in December, 1870, leaving two children now living, Emma and Thomas, who are both still living, and Grace, who died in January, 1870, leaving four children, now living.

Therefore, in June, 1871, there were two subsisting lines of the testator's descendants; the one springing from Alexander Ross the younger, and represented by two grandchildren of the testator and one great-grandchild, the only child of a deceased grandchild; the other springing from William Francis Ross, and represented by two grandchildren of the testator, two great-grandchildren springing from his dead grandchild William, and four great-grandchildren springing from his dead grandchild Grace. The question on the petition is as to the shares in which Alexander Ross's estate is to be distributed among those persons.

It is singular that a question of this sort should be uncovered by judicial authority; but no case bearing on it was cited at the bar, and I have been unable to find any.

The Statute of Distributions deals separately with the case of descendants, and that of next of kin not descendants. The case of children is provided for by the 5th section (which is referred to in the 3d), and the case of next of kin, not being descendants, by the 6th and 7th sections. The general effect of the provisions is, that (supposing there to be no wife) the estate, in case there are descendants, shall go between the children and their representatives; and in case there are no descendants, shall go amongst the next of kin or their representatives; and that the division is *per capita* where all the takers claim in their own right; and *per stirpes* where they, or some of them, claim as representatives of another person.

It has been long settled that the word "representatives" in this Act includes only "descendants."

It has been further settled that where all the persons entitled to claim are collaterals equally near of kin, for instance, second cousins twice removed, they take *per capita*, because they all take in their own right; but that where there are no ancestors or descendants, and the nearest of kin are brothers and sisters, but there are also children of dead brothers and sisters, the latter, though not of the next of kin, may claim as representatives of the brother or sister from whom they spring, and may stand in the place of that brother or sister for the purpose of distribution; so that the distribution is *per stirpes*. This privilege is expressly limited by the Statute, and does not extend to any more remote descendants of brothers and sisters than their children, and does not apply at all to any case where the next of kin are all more remote than brothers and sisters.

There are, therefore, two cases provided for by the Statute, viz., 1, where there are children, or the representatives — *i. e.*, the descendants — of children; 2, where there are no descendants.

It is the former case alone that has to be dealt with here. Considering the question as one solely on the construction of the Statute, it is

difficult, I think, to resist the conclusion that, if there are descendants but no children living to share the estate, it is to be divided into as many shares as there are children who have left living descendants, and that the descendants of each such child are to take as representing the child, and, of course, only the child's share.

The Statute of Distributions was drawn by a civilian, Sir Walter Walker, and seems to have been intended to introduce the rules of the Roman civil law into this branch of English law. It is, therefore, perhaps, not irrelevant to remark that the view of the construction of the Statute which is taken above makes it conformable to the Roman law. It will be sufficient for this purpose to refer to the 118th Novel, and, as commentaries, to the Elements of Heineccius, pl. dcexlvi, and Mühlenbruch's Doctrina Pandectarum, pl. 632. Citations to the same effect might, I think, be multiplied to any extent.

The principal difficulty in the case is this: In Toller on Executors (which may almost be called the received text-book on the subject) a different opinion is expressed. [In the 7th edition, by Whitmarsh [1838], the passage is at page 374.] Various authorities are cited for this, but none of them apply to the case of descendants. The *dictum* is transferred into Williams on Executors, where, in the 6th edition [1867], it occurs in page 1385. But it appears to stand there on the authority of Toller alone, since the only cases cited are those cited by Toller, and irrelevant.

On the other hand, there is a remarkable passage in Hargrave's Jurisconsult Exercitations, pages 270–272, in which, speaking of Dr. Harris's Justinian, he asserts what would seem to be the true construction of the Statute; and a similar view is to be found in Burton's Compendium, pl. 1403, which was, I believe, published about 1830, and has gone through numerous editions; and the true principle is stated in Blackstone and many other text-books, though the special distinction between descendants who can take only as children, or representatives of children, and next of kin who take in their own right, however remote, is not pointed out.

The text-books are not, strictly speaking, authorities on such a question; if, however, there had been an absolute consent among them on a point likely to be of such frequent occurrence, one would have hesitated to pronounce an opinion in opposition to what might seem to be an established course of distribution. But in the face of the passage from Hargrave, which has been often referred to, and of the statement in all the editions of a popular elementary work like Burton, it cannot be said that there has been such a consent.

Feeling, therefore, free to follow my own clear opinion on the construction of the Statute, I hold that in this case the sum in question must be divided into moieties, of which one is divisible among the descendants of Alexander Ross the younger, and the other among the descendants of William Francis Ross; the division among each class being in each case *per stirpes*.

Mr. Greene, Q. C., and *Mr. Millar*, for the petitioners.

Mr. Bedwell, for the respondents W. H. Ross, Francis Ross, James Selby, and Emma Margaret, his wife, and Thomas Ross, great-grandchildren and grandchildren of the testator, claiming under William Francis Ross.

Mr. Everitt, for the respondents, the other great-grandchildren claiming under William Francis Ross, supported the same view.

Mr. Method, for the trustees.

IN RE NATT.

CHANCERY DIVISION. 1888.

[*Reported* 37 *Ch. D.* 517.]

ORIGINATING summons by the trustees and executors of Sarah Natt (widow), who died on the 25th of March, 1879, raising some questions with regard to one sixth share of her residuary estate, devised and bequeathed by her will dated the 1st of December, 1875. The first question was, whether the one sixth share of the residue had lapsed, and the court held that it had. The other questions were, whether the share, so far as it consisted of real estate or the proceeds of the sale thereof, devolved on the heir-at-law of the testatrix; whether the share, so far as it consisted of personal estate, devolved on her next of kin; and, whether such next of kin took *per stirpes* or *per capita*.

The testatrix was twice married. The name of her first husband was John Bassett. She had no children by her second husband. By her first husband she had only two children — viz., Henry John Bassett and Sarah Underhill, who became the wife of George Collin. They both died before the testatrix.

Henry John Bassett had five children, three only of whom survived the testatrix — viz., Mrs. Head, Harry Bassett, and James Bassett. Harry Bassett was the heir-at-law of the testatrix. Mrs. Collin had two children, one only of whom, G. N. Collin, survived the testatrix.

G. N. Collin died on the 20th of April, 1886, a bachelor.

Marcy, for the plaintiffs.

R. F. Norton, for the children of Henry John Bassett.

F. L. Wright, for the representative of G. N. Collin.

Bunting, for the heir-at-law of the testatrix.

NORTH, J. I observe that Lord Hardwicke, in *Lockyer* v. *Vade*, Barnardiston, Ch. 444, said that upon the opening of the cause "he inclined to be of a contrary opinion" from that which he expressed at the close of the hearing, viz., that, there being grandchildren living at the death of an intestate, but no children, the grandchildren should take *per stirpes*. I must confess that when this case was first opened I also was inclined to think that the rule was as it is stated in Williams

on Executors. But on further consideration I have come to the conclusion that it is not so, and I think that *In re Ross's Trusts*, Law Rep. 13 Eq. 286, is really an authority to the contrary. I think that section 3 of the Act points out distinctly a difference between the "wife and children, or children's children, if any such be," of the dead man, and his "next of kindred." I read the words "children's children" as meaning "issue of children," and I think that section distinguishes clearly between children and descendants of children, on the one hand, and "next of kindred," on the other hand. Then section 5 provides that the distribution is to be as follows, one third to the wife of the intestate, and the residue equally amongst the children and "such persons as legally represent such children, in case any of the said children be then dead." It was decided long ago that the persons who "legally represent" the children are their descendants in any degree. I think the words "in case any of the said children be then dead" apply to the case of an only child being dead. The effect, therefore, of section 5, putting it shortly, is to give one third of the surplus of the estate to the wife of the intestate, and the other two thirds equally among his children, and such persons as legally represent the children, in case any of them be then dead. Then section 6 provides for the case of an intestate leaving a wife, but "no children, nor any legal representatives of them," that is, no children living in themselves or in their descendants. In that case half of the surplus is allotted to the wife, and the other half is "to be distributed equally to every of the next of kindred of the intestate who are in equal degree, and those who legally represent them." Then comes section 7, which (omitting the first proviso) provides that, "in case there be no wife," all the estate is "to be distributed equally to and amongst the children: and, in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid." The proviso at the beginning of section 7 is, "provided that there be no representations admitted among collaterals after brother's and sister's children." I think that proviso is really an appendix to both section 6 and section 7, and that the two sections would read more clearly if the proviso were placed at the end of section 7, and the two sections were then read as one. Section 6 provides for the case of an intestate leaving a wife, but leaving no children, either living themselves or represented by their descendants, and in that case half the estate is to go to the wife, and the other half is to be divided equally among "the next of kindred who are in equal degree, and those who legally represent them." But there are other possible cases for which the Statute proceeds to provide. There might be no wife living at the death of the intestate, but there might be children living; or there might be no child living; and section 7 provides for both those cases. Mr. Norton construes section 7 as if it had said that the estate is "to be distributed equally to and amongst the children; and, in case there be no child, then to the next of kindred in equal degree of the intestate, including the descendants

of deceased children, and their legal representatives as aforesaid." I think it would make no difference whether the word "representatives" is read as applying to "children," or not. But I think the true construction is, that the words "next of kindred" mean next of kindred exclusive of issue of the intestate. If there is no wife of the intestate living, the entirety of the estate is to go to his children, in the same way as two thirds go to them under section 5 if there is a wife to share with them. The words "to and amongst the children" are not intended to define exactly how the estate is to go to them; they are merely words of reference to what has gone before, implying that the distribution of the whole is to be as already directed in the case of the two thirds. The last clause of section 7 provides for the case of there being no child of the intestate. It does not say "in case there be no child or representative of any child," but I think it means "no child living either in person or in its descendants." The provision for "next of kindred" is addressed merely to the case of children, *i. e.*, children living either in themselves or in their descendants, being out of the way. I admit that this view of the meaning of the Statute is contrary to that taken in Williams on Executors, following the older work Toller on Executors, and which has been adopted by some other text-writers. But the cases which are cited as authorities in support of the proposition applied to a different state of circumstances. They were all cases relating to collaterals, not to children of the intestate in the statutory meaning of the word "children."

The second rule stated in Williams on Executors (8th ed., Vol. II., page 1503) is as follows: "Where the intestate's children are all dead, all of them having left children. If a father have three children, John, Mary, and Henry, and they all die before the father, John leaving, for instance, two children, Mary three, and Henry four, and afterwards the father die intestate, in that case all his grandchildren shall have an equal share: for as his children are all dead, their children shall take as next of kin. Such also would be the case with respect to the great-grandchildren of the intestate, if both his children and grandchildren had all died before him. In these instances, the parties are said to take *per capita*, or, in other words, equal shares in their own right."

That view is, however, at variance with the view taken in Burton's Compendium (7th ed., page 438, pl. 1403, *note*). There it is said: "It has been thought, however, that where the claimants are all in the same degree of lineal descent from the intestate (as grandchildren after the death of all his children), the distribution is not to be made on the principle of representation, but by the more simple rule of personal equality; or, as it is commonly expressed, *per capita*, and not *per stirpes*. See Toller on Executors, page 375. But it may be doubted whether this was the intention of the Statute; and the authorities (as *Davers* v. *Dewes*, 3 P. Wms. 40; *Lloyd* v. *Tench*, 2 Ves. Sen. 213, &c.) which establish that mode of distribution in the case of col-

laterals, under section 6, are grounded upon a reason which does not apply to the issue of the intestate (viz., that where all take as equally *next of kin*, the words of the Statute afford no room for the introduction of representative claims). For there is no mention of the next of kin in any part of the Statute which precedes the supposition of a failure of the intestate's issue."

A passage similar to that which I have read from Williams on Executors is to be found in the text of Watkins on Descents (4th ed., page 259). But in the 4th edition there is this note by Mr. Joshua Williams: "The authorities here referred to do not support the position taken in the text. They are all cases of the children of deceased brothers of the intestate taking *per capita*, there being no mother, brother, or sister of the intestate living at his death. But in these cases the children of the brothers take as next of kindred, and not by representation, whereas the descendants of the children of an intestate take under the description of 'such persons as legally represent such children.' It would seem, therefore, that the grandchildren ought to be entitled *per stirpes*."

I have looked at the passage in Mr. Hargrave's Jurisconsult Exercitations (Vol. I., page 271), which was referred to by Vice-Chancellor Wickens in his judgment in *In re Ross's Trusts*, Law Rep. 13 Eq. 294, and I find that that learned writer takes a view at variance with that taken by Williams and Toller. Mr. Hargrave says: "A very distinguished civilian (Dr. Harris) of the present times (to whom his country already stands highly indebted for his elegant and masterly edition of Justinian's Institutions, and to whom it may owe far more if he should prosecute his design of a more enlarged commentary) seems to have been almost aware of this difficulty; and, as if he thought consistency required it, he openly contends on our Statute of Distribution for excluding the distribution *per stirpes*, even as amongst grandchildren, when they are the only claimants: though he candidly confesses, that by Justinian's law it was clearly otherwise, and that he did not meet with any judicial determination to prove the doctrine in respect to our own law. But it may be doubted whether our courts of equity would be easily induced thus to extend this restrictive construction of the distribution *per stirpes* to descendants. It was once indeed attempted before Lord Chancellor Hardwicke. But, after hearing the point discussed, he discouraged the idea of a distribution *per capita*, and gave an opinion against it, though not a final one." It is clear, therefore, that the opinion of Lord Hardwicke, after hearing the point fully argued in *Lockyer* v. *Vade*, was in favor of a distribution *per stirpes* among grandchildren, and he arrived at his ultimate conclusion after having begun with taking the contrary view. There is, therefore, not merely a conflict of opinion among the text-writers, but there is what I must consider the decision of Lord Hardwicke that the division should be *per stirpes*. There is, moreover, the case of *In re Ross's Trusts*, Law Rep. 13 Eq. 286, before Vice-Chancellor Wickens. If I am

right in my construction of the Statute, that it gives nothing in terms to the grandchildren of the intestate, but that the provision for "children" covers all the descendants of children, the decision in *In re Ross's Trusts* is directly in point. If Mr. Norton's argument is correct, the fund in that case should have been divided into sevenths, instead of into moieties, and the distinction which he has attempted to draw does not seem to me to alter the effect of the decision. *In re Ross's Trusts* confirms my view of the construction of the Statute, and it adopts that of Lord Hardwicke.

Under these circumstances, I hold that the one sixth share of residue which is undisposed of in the present case must, so far as it consists of personal estate, be divided into moieties. One of the moieties will be equally divided among the three children of Henry John Bassett, the other will go to the representative of G. N. Collin. The lapsed share, so far as it consists of realty, will go to the heir-at-law of the testatrix.

NOTE. — Under the Statute of Distributions the half blood take equally with the whole blood. *Watts* v. *Crooke*, Show. P. C. 108. And see *Burnet* v. *Mann*, 1 Ves. Sr. 156 (1748).

Under the St. Jac. II. *c.* 17, § 7, where an intestate leaves a wife, mother, brothers, and sisters, but no issue, the wife takes half, and the other half goes among the mother, brothers, and sisters equally. *Keylway* v. *Keylway*, 2 P. Wms. 344 (1726). So where he leaves a wife, mother, and the children of a deceased brother, but no issue or brothers or sisters, the wife takes half; the mother, a quarter; and the nephews and nieces, the other quarter. *Stanley* v. *Stanley*, 1 Atk. 455 (1739). And under the same Statute, brothers and sisters of the half blood, as well as of the whole blood, share with the mother. *Jessopp* v. *Watson*, 1 Myl. & K. 665 (1833).

A widow to whom a legacy has been given in lieu of all claims on the estate, may yet share in personal property which has become undisposed of, by reason of a lapsed or void residuary bequest, *Pickering* v. *Stamford*, 3 Ves. 332 (1797); but not in personal property which is undisposed of on the face of the will. *Lett* v. *Randall*, 3 Sm. & G. 83 (1855).

CHAPTER XII.

REAL AND EQUITABLE ASSETS.

SECTION I.

REAL ASSETS.

St. 29 Car. II. c. 3, § 10. (3) And if any *cestui que trust* hereafter shall die, leaving a trust in fee-simple to descend to his heir, there and in every such case such trust shall be deemed and taken, and is hereby declared to be, assets by descent, and the heir shall be liable to and chargeable with the obligation of his ancestors for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended; any law, custom or usage to the contrary in any wise notwithstanding.

St. 3 & 4 Wm. & M. c. 14. (1691). *An Act for Relief of Creditors against Fraudulent Devises.* Whereas it is not reasonable or just, that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts; and nevertheless it hath often so happened that where several persons having by bonds or other specialties bound themselves and their heirs, and have afterwards died seised in fee-simple of and in manors, messuages, lands, tenements, and hereditaments, or had power or authority to dispose of or charge the same by their wills or testaments, have to the defrauding of such their creditors, by their last wills or testaments devised the same, or disposed thereof in such manner as such creditors have lost their said debts: for remedying of which, and for the maintenance of just and upright dealing,

II. Be it enacted and declared by the King's and Queen's Most Excellent Majesties, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, that all wills and testaments, limitations, dispositions, or appointments, of or concerning any manors, messuages, lands, tenements, or hereditaments, or of any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee-simple, in possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, to be made after the five and twentieth day of

March, in the year of our Lord God one thousand six hundred ninety and two, shall be deemed and taken (only as against such creditor or creditors as aforesaid, his, her, and their heirs, successors, executors, administrators, and assigns, and every of them) to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect; any pretence, color, feigned or presumed consideration or any other matter or thing to the contrary notwithstanding.

III. And for the means that such creditors may be enabled to recover their said debts, be it further enacted by the authority aforesaid, that in the cases before mentioned, every such creditor shall and may have and maintain his, her, and their action and actions of debt, upon his, her, and their said bonds and specialties, against the heir and heirs at law of such obligor or obligors, and such devisee or devisees, jointly by virtue of this Act; and such devisee or devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended.

IV. Provided always, and be it enacted by the authority aforesaid, that where there hath been or shall be any limitation or appointment, devise or disposition, of or concerning any manors, messuages, lands, tenements, or hereditaments for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person, other than the heir at law, according to, or in pursuance of, any marriage contract or agreement in writing *bona fide* made before such marriage, the same and every of them shall be in full force; and the same manors, messuages, lands, tenements, and hereditaments, shall and may be holden and enjoyed by every such person or persons, his, her, and their heirs, executors, administrators, and assigns, for whom the said limitation, appointment, devise, or disposition was made, and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators, and assigns, for such estate or interest as shall be so limited or appointed, devised or disposed, until such debt or debts, portion or portions, shall be raised, paid, and satisfied; anything in this Act contained to the contrary notwithstanding.

V. And whereas several persons being heirs at law, to avoid the payment of such just debts, as in regard of the lands, tenements, and hereditaments descending to them they have by law been liable to pay, have sold, aliened, and made over such lands, tenements, or hereditaments, before any process was, or could be issued out against them; be it further enacted by the authority aforesaid, that in all cases where any heir at law shall be liable to pay the debts of his ancestor in regard of any lands, tenements, or hereditaments descending to him, and shall sell, aliene, or make over the same, before any action brought, or process sued out against him, that such heir at law shall be answerable for such debt or debts, in an action or actions of debt, to the value of the land so by him sold, aliened, or made over; in which cases all creditors

shall be preferred, as in actions against executors and administrators, and such executions shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts; saving that the lands, tenements and hereditaments *bona fide* aliened before the action brought, shall not be liable to such execution.

VI. Provided always, and be it further enacted by the authority aforesaid, that where any action of debt upon any specialty is brought against any heir, he may plead *riens per descent*, at the time of the original writ brought, or the bill filed against him; anything herein contained to the contrary notwithstanding; and the plaintiff in such action may reply, that he had lands, tenements or hereditaments, from his ancestor before the original writ brought, or bill filed; and if upon issue joined thereupon it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements, or hereditaments so descended, and thereupon judgment shall be given, and execution shall be awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer, or *nihil dicit*, it shall be for the debt and damages, without any writ to inquire of the lands, tenements, or hereditaments so descended.

VII. Provided also, and be it further enacted, that all and every devisee and devisees, made liable by this Act, shall be liable and chargeable in the same manner as the heir at law by force of this Act, notwithstanding the lands, tenements, and hereditaments, to him or them devised, shall be aliened before the action brought. Provided always, that this Act shall be in force for three years, and to the end of the next session of Parliament after the expiration of the said three years, and no longer.[1]

[1] Made perpetual St. 6 & 7 Wm. III. *c.* 14, § 2 (1695). See St. 11 Geo. IV. & 1 Wm. IV. *c.* 47 (1830).

The remedy against a devisee under this Statute is confined to debt; covenant cannot be brought. *Wilson* v. *Knubley*, 7 East, 128 (1806).

The remedy is personal against the heir, and under the Statute against the devisee; neither at the common law nor by the Statute can the land be followed. *Mathews* v. *Jones*, 2 Anst. 506, 515 (1794). *Spackman* v. *Timbrell*, 8 Sim. 253 (1837). *Pimm* v. *Insall*, 1 Mac. & G. 449 (1849). *Richardson* v. *Horton*, 7 Beav. 112 (1843).

The equity of redeeming a mortgage in fee will be dealt with like legal real assets. *Sollcy* v. *Gower*, 2 Vern. 61 (1688). As to other cases in which equity will give ancillary aid in making real assets available for the specialty creditors, see *Bedford* v. *Leigh*, 2 Dick. 707 (1785); *Tyndale* v. *Warre*, Jac. 212 (1821); *In re Royle*, 5 Ch. D. 540 (1877); 2 Set. Dec. (4th ed.) 806.

See Wms. on Real Assets, *cc.* 2, 3. On the application of real estate in the United States to pay debts and legacies, see 2 Woerner, Amer. Law of Adm. §§ 463–488.

SECTION II.

EQUITABLE ASSETS.

SILK *v.* PRIME.

CHANCERY. 1768.

[*Reported* 1 *Bro. C. C.* 138, *note.*]

SILK and others, creditors of Christopher Thompson, plaintiffs; Francis Prime, Richard Moxon, and others, defendants.

Christopher Thompson by his will, dated 27th December, 1759, gave specific parts of his personal estate to his wife and two daughters; and, after reciting that he had, previously to his intermarriage with his wife, settled the reversion of his farm-house, and lands, and premises in Outnewton, in the county of York, after the decease of his mother, to the use of his wife for life, in case she should survive him, with remainders over, and that the mother was then living; therefore he gave to his said wife, in case of his death in the lifetime of his mother, an annuity of £60 during the mother's life, to be paid by his executors, and he charged his messuages and premises wherein he dwelt, and his messuage, staith, and premises in the High Street in Kingston upon Hull, and all his estate there, with the payment thereof; and declared that, on the death of his mother, the annuity should cease. And he devised all his lands and premises purchased by him in Outnewton to his mother, her heirs, and assigns; and he ordered and directed that all his just debts should be paid; and in case his personal estate should, on account of any losses, be rendered not sufficient to pay all his just debts, he charged all his messuages and premises and real estate whatever (except the lands in Outnewton, settled on his marriage and the lands devised to his mother) with the payment of all his just debts. And in case his personal estate (save what he had thereby given to his wife and daughters) should fall short in payment of all his just debts, he directed that the defendants Prime and Moxon, or the survivor of them or his heirs, should sell all his messuages and estate in Kingston upon Hull, charged as aforesaid, with his messuages in Wincomely, and his close in Beverley, and all other his real estate (except as aforesaid), or such other part or parts thereof as should, with his personal estate, be sufficient to pay all his just debts, and to apply the money arising therefrom, together with the money arising from his personal estate, for the payment of all his just debts. He gave all the surplus money, arising as well from the sale of all or any part of his real estate, as also from his personal estate, to his wife and two daughters, and devised to

them all his estate which should not be sold for payment of his debts, and appointed Prime and Moxon executors.

This cause was first heard at the Rolls, 16 and 17 June, 1766, when the late *Sir Thomas Sewell* determined that the assets arising from the sale of the estate were to be considered as equitable assets, upon the ground, that the devise was to the executors and their heirs, observing, at the same time, that it would be otherwise if the devise had been merely to the executors. He said, by this devise, the descent was broken at law, and the only special circumstance was, that of the trustees and their heirs taking the real together with the personal estate. From this decree there was an appeal to the Lord Chancellor, who on the 8th of March, 1768, affirmed the same, and delivered a very elaborate argument, to the following purport, of which the reporter has been so fortunate as to obtain a very accurate note.

Lord Chancellor [Camden]. When this appeal was argued, I thought the question depended so much upon the general doctrine of legal and equitable assets, that I desired time to look into the cases, to see what general rules had been established upon that subject; for all doubtful points are decided by an application of general principles to the particular case.

Where trustees for the payment of debts are made executors, the printed cases had ruled the assets to be legal. This caused me to doubt, because I had always understood the doctrine of this court was the reverse, and, therefore, I thought it necessary to look back to the origin of this business, and to fix the principle.

Where an estate is devised to trustees for the payment of debts generally, it has long been the constant practice of the court to pay all the debts *pari passu*. This is declared in the case of *Woolestoncroft* v. *Long*, 1 Cha. Ca. 32. And the same is again laid down in 2 Cha. Ca. 54, *Anonymous*.

As the money, in these cases, never reaches the hands of the executors, no action lay; and the creditor was obliged to come into this court for satisfaction.

Whereupon, equity not being tied down to the rule of law, introduced a new method of administration. And seeing the testator had made no distinction between the difference of securities given for the payment of debts, the court conceived that the testator meant to do equal justice to all his creditors.

Nor did the court, in this respect, do any injury to specialty creditors. For, though real estates are assets, at law, to pay such debts, yet the creditor might be defeated by the debtor's will, or the heir's alienation. So that where the will had set aside the law, equity would have forgot its own principle of equality, by giving a priority, which the testator had not done; all debts being equal in conscience.

Upon this ground, the Statute of Fraudulent Devises allowed devises for the payment of debts to be good, though the Act annulled every other devise to the prejudice of specialty creditors.

This I consider as a parliamentary approbation of equitable assets, which, standing as it does, upon such ground of justice, the testator's intention, the rule of equality, and the sanction of the Legislature, ought always to preponderate, in a doubtful case; and Sir Joseph Jekyl's opinion in *Cox's Case*, 3 Wms. 344, should be always remembered, who said, he would always do his utmost to extend the rule.

Where the trustee is not executor, the case is clear.

Where the land is charged with the debts, it is clear likewise.

But, where the testator put the trust into the executor's hands, there was a considerable doubt, how to distinguish the capacities of the two characters; as executor, the assets were legal; as trustee, they were equitable.

The law had determined, that where land was devised to be sold by executors, or devised to executors to be sold, in both cases the assets were legal. In this respect, the law made no difference between the interest and the power, and that is evident. Any person who will peruse Co. Lit. 112 *b*, 113 *a*, with any attention, will be of that opinion, and all the cases in Ro. Abr. under that head speak the same language.

These kind of devises had been so frequently at law, and the determination so uniform, that they seemed, for a time, to have overpowered the courts of equity; for I find that almost all the printed cases followed this rule, and made the assets legal.

So is *Girling* v. *Lee*, 1 Vern. 63; *Anonymous*, 2 Vern. 133; *Greaves and Powell*, 2 Vern. 249. Two strong cases in Prec. Chan. *Clutterbuck* v. *Smith*, 127; *Bickham* v. *Freeman*, 136; *Bunbury*, 339; *Lord Masham* v. *Harding*.

Lord King, in the case of *Walker and Meager* [2 P. W. 549] Mos. 204, which I don't well understand, avoided the point.

These authorities did perplex me exceedingly; for I had all my time taken it for granted that the rule here was otherwise.

At last I find this note in Mr. Tracy's book, *Lewin* v. *Oakley*, 2 Atkyns, p. 50.

July 26th, 1740. "Devise to trustees for payment of debts, and the same persons are made executors. The assets, said the court, shall, notwithstanding, be equitable and not legal. There are cases in Vernon, where it is held, that debts in such cases shall be paid in a course of administration, but the modern resolutions have been otherwise."

I sent to the register's book, and find, that was the very point of the cause; and, upon the Master's report, Lord Hardwicke determined that the simple contract, and the specialty debts should be paid *pari passu*.

The words of the will were: Testator devised his estate to A. and B. and their heirs, in trust to sell the same, and, thereout, in the first place, to pay his debts, and appointed them executors.

And now, I think the old rule is overthrown, and that wherever the land itself is devised to the same persons who are executors, the assets will be equitable.

And I hold the case to be the same whenever the land is devised to

them, or to them and their heirs, for in both cases they are equitable trustees. The descent is broke, and the specialty creditors have lost their fund.

And I can hardly now suggest a case where the assets would be legal but where the executor has a naked power to sell *qua* executor.

What I have said shows that this court has justly a partiality and predilection to equitable assets, which ought to turn the scale, in all cases where the matter hangs in equal balance.

This disquisition is, therefore, not proper, though it must be admitted, that, in the present case the trustees and executors have no more than a naked power; for nothing is devised to them, and, therefore, the doctrine I have laid down is not directly applicable to this case; but two rules are obtained.

1. It is a good rule of expounding wills, to make them speak in favor of equitable assets, if it may be done.

2. That if you can lodge the assets in the hands of the trustees, the court will never put them in the hands of the executors; and when one person is invested with both characters, the trustee shall be preferred.

To come to the case.

1. The testator's will does most emphatically direct the payment of all his just debts.

I can never think, that a man who does, repeatedly, and so anxiously provide for the payment of all, could ever mean, by legal preference, to pay some, and leave the rest unpaid.

2. The power is lodged not in executors solely, but in them or their heirs; and it is clear that the moneys could never be assets in the hands of the executor's heir, nor could the creditor ever maintain his action against such heir.

Nor is it any answer to this objection, to say, that the word heir is inserted by mistake, or to be resembled to those cases where personal estate is given to a man and his heirs, or real estate to a man and his executors.

In those cases, the subject matter of the devise points out the proper succession, and the literal will is nonsense.

But here, the word heirs has a useful and proper meaning, for it converts the executor into a trustee, and makes the assets equitable, which is a favorite point in this court.

But it has been said, that the testator has, here, united both funds together in the hands of his trustees and executors, and therefore both must be one consolidated fund, to follow the same course of administration.

For the words are, that they shall apply money arising from the real estate, together with the moneys arising from his personal estate, to pay, &c.

The answer is, that in all cases, where the trustees and executor are one person, the funds are consolidated in the same manner — for, out of both, he is to pay all his debts.

But the course of administration is different, and by that very method, it is, that the court is enabled to pay all the debts without distinction, as far as the assets will go, and, by marshalling both kinds of assets, makes them amicably combine to answer the full intention of the testator.

3. This is the case of a charge upon the lands.

They are devised to the testator's wife and daughters subject to this charge.

In this respect it is a trust, and no more to be sold than what is necessary for this purpose.

The power, then, to sell is merely consequential, the testator having named the executor for this purpose. The court would have compelled the devisees. Whoever sells to satisfy a charge must be a trustee, because a charge is a trust.

To make this still clearer,

The rents and profits in the hands of the devisees are assets before the sale. Legal assets they cannot be, for the executors have no right to receive them. They must therefore be equitable assets.

And, if it be once admitted that any one part of the land is equitable assets, the whole must be the same, for the trust is one and the same trust throughout. *Decree affirmed.*

SHALLCROSS *v.* FINDEN.

CHANCERY. 1798.

[*Reported* 3 *Ves. Jr.* 738.]

RICHARD WARD being seised of the remainder and inheritance of freehold estates in Leicestershire, expectant upon an estate for life in his father, and subject to a mortgage, by his will made the following disposition: —

"After payment of all my just debts funeral expenses and the expenses of the probate hereof as likewise my testamentary articles I give and bequeath unto my trusty and worthy servant Mary Heath the sum of £50 of true and lawful money of Great Britain to be paid unto her as soon as convenient after my decease. And as to such expectancies in fee in reversion or any other claim I may hold upon that freehold tenement situated at Husband's Bosworth com. Leicester now in possession of Samuel Stevens at the time of my decease I give and bequeath the whole of such title and claim unto my dearly beloved father William Ward for his own use and benefit forever. I likewise bequeath unto my said dearly beloved father all my household furniture linen and wearing apparel likewise plate pictures &c."

The testator appointed his father executor.

After the deaths of the testator and his father the bill was filed by the simple-contract creditors of the former against the devisees in trust and legatees of William Ward, the father; the simple-contract debts of Richard Ward exceeding his personal estate to the extent of £670; and the question was, whether by his will those debts were charged upon his real estate.

Mr. Graham and *Mr. R. Smith,* for the plaintiffs.

Mr. Piggott, for the defendants.

Master of the Rolls. [Sir Richard Pepper Arden.] Is there a single case, in which the testator has said "after payment of my debts," and the court has said, it shall not affect all the real estate, whether specifically devised, or not? I do not know such a case. The words "after payment of my debts" mean, that he will not give anything, until his debts are paid. He could not help paying his debts out of his personal estate. He could not give a pecuniary legacy but after his debts paid. Therefore if I do not make that construction, part of the will is perfectly nugatory. I agree, that if a testator does manifest in any part of his will, that his debts shall be paid, they are to be paid before any disposition of what he has power to dispose of. "After payment of his debts" means, that, until his debts are paid, he gives nothing; that everything, he has, shall be subject to his debts. To give those words any effect, they must charge the real estate. I am very clearly of opinion, that wherever a testator says, he wills, that his debts shall be paid, that will ride over every disposition, either as against his heir at law or devisee; and the words "after my debts paid" mean the same thing.

As to the distinction between debts and legacies, I am still of the same opinion, that I held in *Kightley* v. *Kightley*, 2 Ves. Jr. 328; though the Lord Chancellor in *Williams* v. *Chitty*, 3 Ves. Jr. 551, doubted my distinction. I cannot agree, that, where there is a specific devise, there is no difference between debts and legacies. The testator must be taken to mean his debts to be paid, and then his legacies to be paid; and a specific devise is as much a legacy in this sense as a pecuniary legacy. If a testator directs his legacies to be paid, and then gives a house or a horse, there is no reason why a specific devise should not take effect as much as a pecuniary legacy. He has as much intention, that a specific legacy shall go to the legatee as a pecuniary one.

Declare, that the debts are charged upon the real estate.[1]

[1] A direction to executors to pay debts does not charge real estate, *Keeling* v. *Brown*, 5 Ves. 359 (1800), unless the real estate is devised to them. *Barker* v. *Devonshire*, 3 Mer. 316 (1817). As to what words will create a charge of debts on real estate, see 2 Jarm. Wills (4th ed.), 582–601.

"In Maryland, since the Act of 1785, *ch.* 72, the insertion of these words ['after my debts and funeral charges are paid'] in a will are wholly immaterial and inoperative, as that Act of Assembly renders the real estate in aid of the personalty equally liable for the payment of debts, whether those words be contained in the will or not, and whether the deceased die testate or intestate. Since the Act of 1785, in Maryland, therefore, no deduction as to any intention of the testator in relation to such a

BAILEY *v.* EKINS.

CHANCERY. 1802.

[*Reported 7 Ves.* 319.]

WILLIAM GARRETT by his will, dated the 26th of February, 1779, directed, that all his just debts, funeral expenses and legacies, should be justly and truly paid and discharged; and he thereby charged and subjected all his real and personal estates with the payment of the same; and he thereby gave, devised, and bequeathed, all his messuages, farms, lands, tenements, hereditaments, and premises, therein described, and also all and singular his goods, chattels, and personal estate, of what nature or kind soever, unto John Ekins, Peter Morris Goddard, and Edward Salter, and to the survivors and survivor of them, and the heirs, executors, and administrators, of such survivor; in trust to sell and dispose of the same and every part thereof, as soon as conveniently might be after his decease, to any person or persons whomsoever, for the best price or prices, that could be had or gotten for the same; and out of the money arising by sale thereof to pay and discharge his just debts, funeral expenses and legacies, and he gave and bequeathed all moneys, that should remain in his said trustees' hands, after they had paid his just debts, funeral expenses and legacies, as aforesaid, and also all other his real estates either in possession, reversion, remainder or expectancy, or otherwise however, not thereinbefore disposed of, with their and every of their appurtenances, unto his said trustees and to the survivors and survivor of them and the heirs, executors, and administrators, of such survivor; in trust to place the said moneys out at interest upon the best security or securities, that could be obtained for the same; and to receive and take such interest from time to time, as the same should grow due, together with the rents, issues and profits, of the said real estates; and thereout to support, maintain and educate, his son William Wither Pincke Garrett, in such manner as they in their discretion should think proper, until he should obtain the age of twenty-one years; and when he should attain that age, then he gave, devised, and bequeathed, the said moneys so placed at interest and the said real estates unto William Wither Pincke Garrett, his executors, administrators, and assigns; and also he gave, devised, and bequeathed, unto his daughters Elizabeth Mary and Anne Garrett, the legacy or sum of £1,500 apiece, to be paid to them severally and respectively as they should attain the age of twenty-one years or be married; and in the mean time and until they, his said daughters,

charge can be deduced from them; they are words of almost unmeaning form in the introductory part of a will, and rarely of any import." — *Per* DORSEY, J., in *Cornish* v. *Wilson*, 6 Gill, 299, 315, 316 (1848). See, *accord.*, *Balls* v. *Dampman*, 69 Md. 390 (1888); *Harmon* v. *Smith* (U. S. C. C. Minnesota D.), 38 Fed. Rep. 482 (1889).

should have obtained that age or be married, he directed his executors hereinafter named to pay unto each of them so remaining under age and unmarried the sum of £60 per annum for their support and maintenance; and he appointed John Ekins, Peter Morris Goddard and Edward Salter, guardians of his said children during their minority, and executors in trust of his said will.

The testator died in August, 1779, leaving one son and four daughters. The bill was filed by creditors; who had obtained administration with the will annexed, and the real estates were sold under the decree, directing the fund to be applied in a course of administration; and the specialty creditors were paid 10*s.* in the pound. The cause came on for farther directions, and upon a petition by creditors by simple contract; praying, that the petitioners may be paid a like proportion of 10*s.* in the pound on their respective debts, equal with the other creditors out of the produce of the real estate.

Mr. Richards and *Mr. Trower*, in support of the petition.

The Attorney-General, for the specialty creditors.

THE LORD CHANCELLOR [ELDON]. The question upon this will, if it turns upon the point, whether the descent was broken, would be, whether during the infancy of the heir the legal estate was in him; and if it was necessary to determine that, I am rather inclined to think, it was not; that the use was not executed in him; considering the words of the will. At the same time it turns upon great nicety. But I do not determine this upon the circumstances of the will; for *Hargrave* v. *Tindal*, 1 Bro. C. C. 136, *note*, and *Burt* v. *Thomas*, and *Batson* v. *Lindegreen*, 2 Bro. C. C. 94, as I charge my own memory with it, are all authorities, that a charge upon real estate does make it equitable assets. I also confirm upon my own memory what Baron Thompson is stated to have said in *Burt* v. *Thomas;* for I am confident, Lord Thurlow's opinion was, that a charge is a devise of the estate in substance and effect *pro tanto*, upon trust to pay the debts. The rule cannot be accurate, when it is stated, that the descent ought to be broken. It would be more accurate to state it thus: that it must appear upon the will, that the testator meant the descent to be broken. Suppose a devise to trustees, in trust to pay debts; and, all the trustees dying in the life of the testator, the estate descends upon the heir; would not that be equitable assets? By the failure of the devise the heir must have had it, as the trustee would, subject to the debts; and yet the descent is not broken, but intended to be broken. But, when it is said, the heir takes by his better title, still the question is, whether he takes, as he would, if that devise had not been made; taking all the circumstances of the devise together. A mere charge is no legal interest. It is not a devise to any one, but that declaration of intention, upon which a court of equity will fasten; and by virtue of which they will draw out of the mass going to the heir or to others that *quantum* of interest, which will be sufficient for the debts; and then getting it into their hands, the only inquiry will be, whether the Statute inter-

poses to make it fraudulent against specialty creditors. The uniform rule is, that a provision by will, effectual in law or in equity for payment of creditors, is not fraudulent within the intent of the Statute.

Upon principle therefore, but, what is infinitely more satisfactory to me, upon authority, I am of opinion upon this will, that, whether the descent is broken, or not, this is equitable assets; and that is a better way of deciding this case than applying to the will, to see, whether the descent is broken, or not; that the principle of my decision may be understood; and reviewed, if wrong, but that will be at the risk of undoing what I considered very well settled.[1]

SECTION III.

PRIORITIES.

LONG *v.* SHORT.

CHANCERY. 1718.

[*Reported* 1 *P. Wms.* 403.]

ONE seised in fee of some lands, and possessed of a lease for years in other lands, and being indebted by specialty and simple contract, made his will, by which he devised a rent-charge of £40 a year out of the lease for years to one grandson, bequeathed the lease itself to another grandson, and likewise devised all his lands in fee to A. and his heirs. None of his devisees were his heirs at law, and his will was made since the Statute against Fraudulent Devises.

And there being a deficiency of assets to pay debts, the question was, whether they should be charged on the real, or leasehold estate?

Decreed by LORD CHANCELLOR [COWPER], 1st, that a devise of a rent-charge out of a term, is as much a specific devise, as if it had been of the term itself.

2dly, that the devise of a term for years is as much a specific devise, as a devise of land in fee. Wherefore, each being equally specific devises, it would, in this case, be an equal disappointment of the testator's intent, to defeat either, by subjecting it to the testator's debts.

3dly, that since the Statute of Fraudulent Devises, lands in fee are equally subject to debts by specialty in the hands of the devisee, as leases in the hands of the executor or legatee are to debts by simple contract at common law.

So that to prevent the disappointment of the testator's intent, the court thought it reasonable, that the devisee of the fee-simple estate, and

[1] See *Shiphard* v. *Lutwidge*, 8 Ves. 26 (1802).
See also on equitable assets, the note, p. 642, *ante*.

the devisees of the lease and annuity, should each contribute to the debts by specialty, in proportion to the value of the respective premises; but that as to the debts by simple contract, if there should be not enough, over and above to pay them, they must fall upon the leasehold premises only.

Hereupon it was objected by *Sir Thomas Powis* and *Mr. Vernon*, that the fee-simple and inheritance ought to be more favored, than any of the personal estate and leases; for that the latter had been always decreed to go in aid of the former, and therefore, in this case, the leasehold estate ought to bear all the debts by specialty, as far as it would extend.

But overruled by LORD CHANCELLOR; for that this might utterly disappoint the testator's intention in providing for his grandsons out of the lease; though the court allowed, that if the devise had been to A. of all the rest of the testator's lands, this had been a residuary (not specific) devise, and the person taking thereby, should not have come in, till after the debts by specialty, or otherwise, had been paid out of his inheritance.[1]

CLIFTON *v.* BURT.

CHANCERY. 1720.

[*Reported* 1 *P. Wms.* 679.]

A. SEISED in fee of freehold lands, and likewise of some copyhold lands which he had *not* surrendered to the use of his will, and indebted by bond in which his heirs were bound, in 1706, made his will, whereby he devised his freehold lands to B. in fee, without charging them with any of his debts and legacies, and gives his copyhold lands to C. in fee, in trust to sell to pay his debts and legacies, and having given a legacy of £500 to D., died, leaving E. his executor; D., the legatee of the £500, brought his bill for his legacy; upon which LORD HARCOURT [C.], decreed, that as to so much of the personal estate as was exhausted by the bond-debt, the legatee of the £500 should stand in the place of the bond creditor against the land, and that the freehold estate should be liable, in default of personal assets, to pay the legacy.

From this decree the devisee of the freehold lands now appealed to the LORD PARKER [C.], insisting that the £500 legacy being by the will charged on the copyhold estate, and that fund failing for want of a surrender, the freehold estate which was expressly devised to another person ought not to be liable, and that the land being specifically devised, was not chargeable with a general pecuniary legacy.

[1] See *Tombs* v. *Roch*, 2 Coll. 490 (1846); *Gerris* v. *Gerris*, 14 Sim. 654 (1847); *Farnum* v. *Bascom*, 122 Mass. 282 (1877), *accord*. *Rogers* v. *Rogers*, 1 Paige, 188 (1828), is *contra*.

Lord Parker, having taken time to consider of it, reversed that part of the decree whereby the freehold estate was subjected to the legacy; observing first, that though equity will marshal assets in favor of a legatee, as well as of a simple contract creditor, yet every devisee of land is as a specific legatee, and shall not be broken in upon, or made to contribute towards a pecuniary legacy.

Secondly, that it was a rule, if one gives a specific legacy of a horse, or diamond, and also a pecuniary legacy of £500 to B. and there are not assets to pay both, still the specific legatee shall be preferred and have his whole legacy; for were the executor to make him contribute towards the pecuniary legacy, this would be, *pro tanto,* to make such specific legatee buy his legacy, against the manifest intention of the testator.

Thirdly, that if a specific personal legatee shall not contribute toward a pecuniary legacy, much less shall a specific devisee of land.

Fourthly, that if in the principal case the testator has devised the £500 to A. and a term of 500 years to B. without leaving assets to pay the £500, still the specific legatee of the lease ought to prevail, without contributing towards the pecuniary legacy; and if such pecuniary legatee shall not break in upon a specific legatee of a term, *a fortiori* shall he not disappoint the will as to a devise in fee, which is more to be favored than a devise of a term, in regard it is with more difficulty that a court of equity, in any case, breaks in upon, or charges, a real estate.

Fifthly, that this case was still stronger, where the testator had appointed a fund for the payment of the legacies, viz., the copyhold; and though that had failed for want of a surrender, the consequence would be, that the fund failing, the legacy must fail also. Indeed the bond creditor might elect to have his debt out of the assets in the hands of the heir, or of the devisee, but in such case the heir or devisee should have this relief, viz. to stand in the place of the bond creditor, and reimburse himself out of the personal estate.

Sixthly, but though equity would thus marshal the application of assets, yet would it not do this to disappoint the will of the testator, by breaking in upon the devise of the freehold which the testator did not intend to charge, but on the contrary showed his design to charge the copyhold estate therewith.

And note, that the decretal order in the case of *Hern* v. *Merrick* [1 P. Wms. 201] was produced, whereby it appeared, that Lord Harcourt did not then determine this point, but reserved it for further consideration.[1]

[1] "It has been contended, that under the first clause of this will, 'First I will and direct, that all my legal debts, legacies, and funeral expenses, shall be fully paid, &c.' where the testator has charged his real estate by will duly attested, both debts and legacies shall take place of every other disposition; and that the legacies shall stand in the same place as debts; even to the disappointment of the devisees; and that there is no reason, why they should not have the same preference. The principle however is

MANNING *v.* SPOONER.

CHANCERY. 1796.

[*Reported* 3 *Ves. Jr.* 114.]

MASTER OF THE ROLLS. [SIR RICHARD PEPPER ARDEN.][1] The question, whether the descended estate is liable before those devised, depends entirely upon this point, whether there is a specific gift of any part of the estate for the purpose of paying the debts; or whether it is only a general charge for that purpose; for upon the doctrine, that is very fully laid down by Lord Thurlow in *Donne* v. *Lewis*, 2 Bro. C. C. 257, there is no doubt of the manner in which the estate of a testator is to be applied in discharging his debts. That case had a very full consideration and discussion; and it was determined upon principles, that have been constantly acted upon since; and which must govern all such cases. From that I collect, that there are four classes of estates to be applied to the debts: 1st, the general personal estate, unless exempted expressly or by plain implication: 2dly, any estate particularly devised for the purpose, and only for the purpose, of paying debts: 3dly, estates descended: 4thly, estates specifically devised. The question therefore is in every case, where the contest is between an estate descended and an estate alleged to be provided for the debts, whether it is a general charge, or any part of the estate is selected for the express purpose of paying the debts. If part is selected for that purpose, that part shall be applied before the descended estate; whether the testator had that estate before he made his will, or not. Lord Thurlow, in considering *Galton* v. *Hancock*, 2 Atk. 424; *Wride* v. *Clark*, 2 Bro. C. C. 259 *n.*, 261 *n.*, and *Davies* v. *Topp*, is clearly of opinion, that the question is, whether the testator has selected any part of his estates, which it was his will should be first applied; or whether the charge is only to subject his estates to the payment of his debts; which otherwise perhaps could not be applicable to them.

perfectly different; the one being purely voluntary, the other obligatory. Wherever a man makes a will, he is supposed to do that, which conscience obliges him to do; and if he shows an intention, that his debts shall take place of every other disposition, and that he meant they should be paid, the court will strictly enforce that intention. The same principle will not apply to legacies, which have been attempted to be put upon the same footing: but it does not follow, that where a testator says, 'In the first place I will, that all my debts and legacies shall be paid;' and then gives certain legacies; and at the latter end of it repeats these words, that such legacies as well as his debts shall be a charge upon the realty; and that because the latter must have a preference, the former shall also have it. The estate so contended to be charged is specifically devised; and I cannot see any reason, why pecuniary legacies should have any preference to such specific devises. If I was to direct these legacies to be so raised and paid, it would be giving them that undue preference." — *Per* SIR RICHARD PEPPER ARDEN, M. R., in *Kightley* v. *Kightley*, 2 Ves. Jr. 328, 330 (1794).

[1] Only the opinion is here given.

That will not make the devised estates applicable in the distribution before those descended. Then taking this case for my guide I am only to consider, which is the case here; whether it is a general charge, or part is selected and appropriated to the debts; and the words are so emphatical as fully to convey the principles, that will guide the decision;[1] especially when we consider the nature of this property; which is situated in the West Indies; and is liable to all his debts independently of any will of his. But even if it was an English estate, which is not liable to all debts, even in that case I should have thought, that a provision of this sort appropriating the rents and profits first to the payment of his debts, is a specific gift, which must be first applied. I cannot consider this as being a general charge for the purpose only of preventing any of his debts remaining unpaid; for the law of the country, where they lie, had sufficiently provided for that; therefore if it is to have any effect, it must be to appropriate this fund, and for no other purpose. If so, the question is, whether according to the principles laid down in *Donne* v. *Lewis*, the plaintiffs have a right to call upon the heir, to whom the estate purchased after the date of the will has descended, to apply that estate first to the debts; and I am of opinion, the heir cannot be called upon to contribute, till that fund, so appropriated, not merely to take care that all the debts shall be paid, but for the particular purpose of the appropriation, has been exhausted. The heir cannot avail herself of this except by being reimbursed out of the rents and profits of this trust fund. She cannot postpone the creditors. That was the case of *Lingard* v. *Lord Derby*, 1 Bro. C. C. 311. The testator may arrange between his heir and devisee; but not so as to take away from the creditor a fund, he has a right to come upon. But if creditors are not concerned, the plaintiffs have no right to call upon the heir; and the money must be paid to her; and the supplemental bill must be dismissed.

Mr. Piggott and *Mr. Thomson*, for the devisees.

Mr. Lloyd, *Mr. Grant*, and *Mr. Allcock*, for the heir.

GREVILLE *v.* BROWNE.

House of Lords. 1859.

[*Reported* 7 *H. L. C.* 689.]

This was an appeal against a decision of the *Lord Chancellor* and *Lord Justice Blackburne*, sitting as Commissioners of Appeal, from the judgment of the Encumbered Estates Court.

[1] The testator gave all his real estate in the islands of Antigua, St. Christopher's, and Tortola, to trustees and their heirs in trust, that they should cultivate and manage the same, and apply the rents and profits, after paying and receiving certain annuities, in the payment of such of his debts and legacies as the residue of his personal estate should prove deficient in paying. — Ed.

John Browne, of Galway, had one son, Michael J. Browne, and two daughters, Maria (Lady Ffrench) and the respondent. By his will (which contained many interlineations), dated 20th January, 1825, he bequeathed to his wife an annuity of £100 in addition to what she was entitled to under her marriage settlement, "the same to be in lieu and satisfaction of any dower or thirds she may be entitled to out of my real estates, or any other property I may die possessed of," with the usual power of distress. Then followed a bequest of the household furniture to his wife; then a sum of £1,000 in trust, to give such part of it as she might think fit to his daughter Anne on her marriage with her mother's consent, "to bear no interest till then; the entire (whole) or the remainder of the said sum of £1,000 to go and be considered as part of the residue of any property as hereafter bequeathed to my first object on earth, my best of sons, Michael Joseph Browne. I further bequeath to my dear and very dear daughter Anne Browne, in addition to any part of the above-recited sum of £1,000, a further or additional sum of £5,000 sterling, including the property already settled on her by my marriage articles; and also the value of the property made over for her use before, all payable on her marriage with the consent of her mother, the interest thereof, at five per cent. to be regularly paid till then. But should my said daughter Anne Browne die before her marriage, then my will is that this bequest shall be considered as part of the residue of my property, and go and merge in same." To his daughter Lady Ffrench (to whom he had given as a portion £10,000) and to her husband and children, and to his own sister Julia he left £5 apiece, and concluded thus: "As to all the rest, residue, and remainder of any property I may die possessed of, or entitled to, of what nature soever, whether estates, freehold leases, leases for years, stocks of every kind, also bills, bonds, notes, annuities, or otherwise, I hereby bequeath, devise, give, and grant the same to my first object on earth, my son, Michael Joseph Browne, in the fullest manner I can or shall have it in my power, with liberty to him to dispose of the same in any manner he may think proper," and he appointed his son his sole executor. By a codicil he appointed John Kirwan his executor in case his son should not wish to act as one of the executors.

The testator died in 1825, and the son having declined to act as executor, the will was proved by Kirwan.

Michael Joseph Browne, the son, entered into possession of the estates, and paid the interest on the legacy of £5,000 to his sister down to 1842. On the 1st September, 1846, he mortgaged the estates to the appellant and other persons. On the 29th May, 1852, a petition for sale was presented in the Encumbered Estates Court, and an absolute order for sale was made on the 8th September, 1852. On the 4th December, 1855, the estates were sold for a sum of £69,410, a sum not sufficient to pay off the mortgages and interest then due.

On the settling of the final schedule on the 15th December, 1856, *Mr. Commissioner Longfield* held, that the respondent, Anne Browne,

was entitled to be paid the legacies bequeathed to her by the will of her father in priority to the mortgagees. The full court confirmed this decision, and on appeal to the *Lord Chancellor* and *Lord Justice Blackburne* in the Court of Appeal, it was again affirmed. The present appeal was then brought.

The Attorney-General (*Sir R. Bethell*) and *Mr. Moxon*, for the appellant.

Mr. Roundell Palmer and *Mr. Lawless* (of the Irish bar), for the respondent, were not called on.

The Lord Chancellor. (Lord Campbell.) My Lords, in this case I am of opinion that the decision of Mr. Commissioner Longfield and Mr. Commissioner Hargrave, confirmed by the Lord Chancellor of Ireland and the Lord Justice of Appeal in Ireland, is right; and I think that if your Lordships were to come to a contrary conclusion, you would disturb the well-settled and useful rules of property which have prevailed for a century and a half.

My Lords, the first question is, whether these legacies are a charge upon the real estate. If it were *res integra*, and we had to construe this will by the language employed, without any reference to the construction which has been put upon similar language in other wills, I might allow that there is great force in the very able and ingenious argument we have had from the bar. It might then be contended that the testator had no notion whatever of charging the land with these legacies; but we find that from the time of Lord Macclesfield and Lord Cowper, down to the time of Lord Cottenham and Vice-Chancellor Page Wood, a rule has prevailed upon this subject which has been acted upon uniformly by all judges except Lord Alvanley, a very eminent authority (I do not mean in the slightest degree to disparage him), but with that exception by all the judges that have determined such cases. For nearly a century and a half this rule has been laid down and acted upon, that if there is a general gift of legacies, and then the testator gives the rest and residue of his property, real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given, is given minus what has been before given, and therefore given subject to the prior gift. That seems to me to be the view which was taken in the cases before Lord Cowper and Lord Macclesfield. The language in which it is expressed varies from time to time, but still that rule seems to have been uniformly acted upon, and I would say, in the language used by Vice-Chancellor Page Wood, in the last case upon the subject, *Wheeler* v. *Howell* [3 K. & J. 198], that in the present case "I feel that I should be only introducing a useless and mischievous distinction if I held the legacy not to be a charge, the principle of the decision being in truth the same in the case of legacies as in that of debts."

I therefore conceive it to be unnecessary to travel over and criticise that long series of cases which seems to establish that as a general rule

which must be acted upon, that the testator, in using this language in his will, must be supposed to use it according to the sense in which the words have uniformly been construed, and to mean that the legacies should be a charge upon the real estate. Here the testator gives the legacies generally, and then he says: "As to all the rest, residue and remainder of any property I may die possessed of, or entitled to, of what nature soever, whether estates freehold, leases, leases for years, stocks of every kind, also bills, bonds, notes, annuities or otherwise, I hereby bequeath, devise, give and grant the same to my first object on earth, my son, Michael Joseph Browne, in the fullest manner I can." It is quite clear, that here there is first a general gift of legacies, and then there is a disposition of the rest, residue, and remainder of his property, real and personal, of what nature soever, to his son. Therefore, following the rule which has been so long acted upon, these legacies are clearly charged upon the real estate.

Then, my Lords, as to the second point, the discharge. Twenty-one years after the death of the testator, his son mortgaged the land for £50,000; and it is allowed that upon the face of the deed there is no reference whatsoever to those legacies. No part of the legacies was paid; and I presume, that after he had thus charged the land with the legacies, unless there is some special power in the will enabling the son to sell the land discharged from the legacies, it can hardly be supposed that what has taken place can amount to a discharge of the burden that was placed upon the land in respect of the legacies. No authority has been quoted to show that this power exists. Is there, then, here any such special power? I am of opinion that the words that follow what I have read are mere surplusage; they merely express what would otherwise be implied. This testator is fond of a florid style; he deals in superlatives; he is very rhetorical, and he makes use of a great many more words than would be sufficient to accomplish his purpose. He says: "I hereby devise, bequeath, give and grant the same to my first object on earth, my son, Michael Joseph Browne, in the fullest manner I can or shall have it in my power, with liberty to him to dispose of same in any way he may think proper." We are now considering whether these lands have been discharged of the legacies: we must consider that they are charged with them. Then he, having thus charged the land, did he mean by those words to give his eldest son the power of disposing of the land at any time, so that the younger children would be deprived of the security which he had before provided for them? I think that no such meaning can be educed from the language he employs, and that therefore this mortgage has not the effect of discharging the land of these legacies. My opinion is, that this appeal should be dismissed, and the decree affirmed.

Lord Brougham. My Lords, I entirely concur with my noble and learned friend, that these legacies are a charge upon the land. The only difference of opinion that I have with him is, that whereas my

noble and learned friend said that if it were *res integra*, not ruled by a long current of decisions, there might be a doubt about it, I really have no doubt at all about it. In the first place, I have no doubt that the decisions which have been given upon this subject are strictly and logically correct; and then I have no doubt also upon the construction of the words themselves, that the legacies here are a charge upon the land.

Lord Cranworth. My Lords, I entirely concur in the opinion which has been expressed by my noble and learned friends, and I also concur with my noble and learned friend opposite, that if there had not been a single decision upon this subject, if I were only called upon to say what is the meaning of such a devise, according to the natural import of the words, and knowing by what class of persons they are written, I should not have the least doubt in the world that nine persons out of ten would mean exactly what the cases have interpreted the words to mean. The distinction that is suggested between real and personal property is an artificial part of the case. It is perfectly true that we know how differently real property and personal property are dealt with by our law. And in reading a devise of real estate to one person and of personal legacies to another, and of the rest and residue of the real and personal property to a third, we may see that there might be a mode of interpreting it *reddendo singula singulis*, as meaning to give the rest of the personal property to one person, and the rest of the realty to another. But that is not the natural meaning of the words. I feel the force of something that was said by Sir John Leach, not in the case in Maddock, but in a subsequent case, where, with reference to the words "the rest and residue of my real and personal estate," he says, that the rest and residue mean something after something has been deducted. After what has been deducted? Why, that which has been given before: and that appears to me to solve the whole difficulty.

The Attorney-General, in his very able argument yesterday, tried to point out a distinction which exists in some of the earlier cases, for the purpose of showing that the generality of the rule, as laid down in the more modern cases, was not warranted by those earlier decisions; and he refers particularly to the case of *Awbrey* v. *Middleton* [2 Eq. Cas. Abr. 497] as being the earliest case upon the subject; and he endeavored to distinguish that case by the circumstance that the legacies there were directed to be paid by the executor, and the gift of the general residue of the realty and personalty was to the executor. He is perfectly correct in that; but it is a singular thing that, not only does Lord Cowper not put his decision upon that, but counsel at the bar, adverting to that circumstance of the direction of the legacies to be paid by the executor, actually puts it as an argument for the contrary result, and says that, inasmuch as the legacies were to be paid by the executor, that shows that they were to be paid only out of the personal estate. In truth, in *Awbrey* v. *Middleton* the real question,

as I understand it, was whether, under the gift of "all the rest and residue of his goods and chattels and estate," real estate was meant to be included. There had been a previous gift in the will of a particular real estate, and the question seemed to turn upon this, whether the word "estate" there was to be held to include real estate. And Lord Cowper said that, inasmuch as he begins by saying, "As to all my worldly estate, I give in manner following," the word "estate" was to be taken to include real estate. But he does not put it at all upon the fact of the direction to the executor, who was his nephew and sole residuary legatee. What he says is this: "Now, the words (rest and residue) in this place may have some stress laid upon them, and seem to refer to the introductive clause in the will (as to all his worldly estate, &c.), which certainly extends to lands in a will, and will bear a larger construction by reference to the first clause, by which he intimates that he intended to dispose of all his estate, both real and personal, by his will, and therefore he was of opinion that by the devise of all the rest and residue of his goods, chattels, and estate, all his lands do pass to his executor, and that he takes by the will, and not by descent as heir at law."

Then, with regard to the decision of *Bench* v. *Biles* [4 Madd. 137], before Sir John Leach, the Attorney-General endeavored very ably to distinguish it from the present case. It appears to me to be utterly undistinguishable. It is true that in that case the blending of the real estate with the personal took place during the life of the widow, who took the whole during her life. What difference does that make? The testator gives all his real and personal estate to his wife for life; he gives pecuniary legacies, and all the rest, residue, and remainder of his real and personal estate he gave, devised, and bequeathed to his two nephews. How is the effect of that altered by the fact that there had been a previous life estate before the pecuniary legacies took effect?

That authority was followed by the same learned judge in *Cole* v. *Turner* [4 Russ. 376], when he was at the Rolls, and which has been evidently followed by Lord Cottenham in *Mirehouse* v. *Scaife* [2 Myl. & Cr. 695], and it has been since followed in two cases by Vice-Chancellor Page Wood. And I feel perfectly confident that if we could know the amounts of property that have been distributed, of which there is no report, in reliance upon the rule of construction laid down by these decisions, we should feel that we were doing the greatest possible injustice if we were to swerve in the slightest degree from what I consider to be the settled canon of construction: I therefore concur with my noble and learned friend that the judgment below ought to be affirmed.

Lord Wensleydale. My Lords, the question in this case is as to the construction of the will of Mr. Browne. What is the true meaning of that will? I take it to be a long and well-established rule, that we must read the words of a will in their ordinary grammatical sense, and give them no other construction than that, unless so reading them leads

to some absurdity, or some contradiction to another part of the instrument which is to be construed. There is no occasion to apply the latter part of the rule in this case.

Now, I confess that without reference to former decisions that have been given upon the subject, if I had read this will for the first time, and had not known that there was any decision upon it, I should not have entertained the least doubt as to its meaning. The testator first begins by a charge upon this estate of £100 a year, with a power to distrain; that is clearly a charge upon the real estate. He then gives other legacies of £1,000 and £5,000, and other small legacies which are clearly *prima facie* a charge upon the personal estate; and then he gives the residue in these terms: "As to all the rest, residue, and remainder of any property I may die possessed of, or entitled to, of what nature soever, whether estates, freehold leases, leases for years, stocks of every kind, also bills, bonds, notes, annuities, or otherwise" (that is, both real and personal), "I hereby devise the same to my son Michael Joseph Browne in the fullest manner I can." I certainly should not feel the least doubt myself that the meaning of that was simply to leave the rest of the personal estate minus the charge upon the real estate. That would give effect to every word in the will; that is, "I leave the remainder of my real estate charged as aforesaid, and I leave the rest of my personal estate, which has several charges upon it before." I should not have had the slightest doubt that that was the true construction of it, and I should never have dreamt that the testator meant to say that the charge upon the personal estate was to be transferred to the real estate.

I have heard complaints at the bar, and I have strongly shared in those complaints, that in all questions of this kind relating to wills, innumerable cases are cited which are of very little authority, because the words of one will differ so much from those of another, that there is very seldom any light derived from decisions upon other wills. If indeed a long course of decisions has established a particular meaning as belonging to particular words, the testator must be supposed to have used those words in that sense, and they must be so construed; but short of that, I think very little effect is to be attributed to former decided cases. And my doubt is certainly, after hearing the very able argument of the Attorney-General at the bar, whether you can predicate from this long bead-roll of cases, that any such principle has been established, that because a testator happens to mention real and personal property in one category, therefore the real property is liable for the legacies. But as my noble and learned friends take a different view, and consider that it has been established as a proposition that wherever realty and personalty are united together in one fund, they are both made subject to the legacies given by the will, of course, that rule of construction must be applied to this particular will. But I own for myself that it would require a much more careful consideration of the authorities than I have now been able to give to them to lead me to come to

that conclusion. The impression upon my own mind is, that there has been no such positive rule established.

With respect to the other part of the case, I concur entirely with my noble and learned friend on the Woolsack. I think these words at the conclusion of the will really give no power at all; they are only an amplification of his gift of the entire estate: "I give and grant the same to my son, Michael Joseph Browne, in the fullest manner I can;" that means merely, I give it to him in fee simple, "with liberty to him to dispose of the same;" that is merely a consequence of his having the fee simple. Therefore, I think in this case there is no power given to mortgage the estate free from the legacies.

Lord Kingsdown. My Lords, I confess that when I read this will at first, it appeared to me to be so clear upon the authorities, as I had understood them to be when I was more familiar with them than I am afraid I can boast of being now, that I thought that some subsequent decision must have altered or diminished the authority of those cases. But from the argument that has been addressed at the bar, it appears, that instead of the rule being limited, it has been, I think, extended, I do not say at all too far, but certainly something beyond the exact principle to which those former authorities went, because it has been applied, I think, in the late cases (I do not mean to cast any doubt upon them) not merely to property given under the words "rest and residue," but to property given previously to the gift either of the residue or the legacies. My Lords, I confess it seems to me that the rule is one of extremely good sense. If any person, unfamiliar with the technicalities of the law, were to read a will to this effect, the testator gives a certain portion of his property to one person, and devises all the rest of his property to another, I cannot doubt that his opinion would be, that "the rest" must be construed to mean that which remains after what has previously been given is withdrawn. The distinction which is relied upon by the Attorney-General is, I think, a distinction which is founded, not upon general principles, or upon the ordinary sense of mankind, but entirely upon the technical rules of the English law. If a testator, having an estate for nine hundred and ninety-nine years, on leaseholds for years, made a devise of this kind, nobody could imagine but that he intended his personal estate to be subjected to the payment of his legacies; and if part of that estate, instead of being leasehold for nine hundred and ninety-nine years, was in fee, or if, instead of being leaseholds for years renewable according to custom, it was leases for lives renewable forever, no one could suppose that he meant to distinguish between the two, and that the one should be subject to legacies, and the other not.

I believe, therefore, myself, that the rule is founded in perfectly good sense and justice, and I must honestly confess that I think nothing but the great authority, and still greater ability with which the point has been argued at the bar, would have made it a subject of reasonable doubt.

My Lords, as to the other point, which was hardly argued at the bar, I think when it comes to be considered, the point does not really arise. There is no doubt, I apprehend, that you may infer a power to give receipts and discharges where you have a power of sale, for the purpose of making certain payments; but where there is an absolute gift of the real and personal estate to the ultimate devisee for his own use and benefit, to dispose of it as he thinks fit, in what character is he trustee? If he had accepted the executorship, possibly some argument might have been raised. I do not say that even then that would have made a difference, but in that case possibly some argument might have been raised. But he is not executor; he is in no degree liable for the payment of the legacies; he is in no degree liable for the administration of the assets; he is simply owner of the estate subject to the charge. Even if he had been trustee, I should have doubted very much whether there was any power. If there had been such a power as the Attorney-General suggests, of disposing of the estate as he thinks fit, that would have made it a different question; but these legacies being charged upon the estate at a period which has not yet arrived, and which may never arrive, in what possible right can the owner of this estate say "I will raise this money"? What can he do with it, except keep it in his own hands till the period arrives, if it ever should arrive, at which the legacies would become payable out of the fund? Therefore I have not the smallest doubt in this case that your Lordships ought to affirm the decree of the court below.

Orders appealed from, affirmed. Appeal dismissed, with costs.[1]

[1] *Greville* v. *Browne* has in general been followed in the United States. See, *e. g.*, *Lewis* v. *Darling*, 16 How. 1, 10 (1853). Cf. 2 Woerner, Amer. Law of Adm. § 452.

In *Lupton* v. *Lupton*, 2 Johns. Ch. 614 (1817), Chancellor Kent decided that a gift of the residue of real and personal property did not charge legacies on such residue, and the case seems never to have been overruled in New York; but the Court of Appeal of that State has shown itself astute to discover distinctions to escape the effect of the decision. *Kalbfleisch* v. *Kalbfleisch*, 67 N. Y. 354 (1876); *Hoyt* v. *Hoyt*, 85 N. Y. 142 (1881); *Scott* v. *Stebbins*, 91 N. Y. 605 (1883).

Lupton v. *Lupton* has been followed, however, in Connecticut, *Gridley* v. *Andrews*, 8 Conn. 1 (1830); in Maryland, *White* v. *Kauffman*, 66 Md. 89 (1886); and in South Carolina, *Laurens* v. *Read*, 14 Rich. Eq. 245 (1868).

A testator gave pecuniary legacies out of a fund to A. and B., and gave the residue of the fund to C. The fund was, in part, needed for debts. *Held*, that the legacies to A., B., and C. abated ratably. *Alsop* v. *Bowers*, 76 N. C. 168 (1877).

HENSMAN *v.* FRYER.

CHANCERY. 1867.

[*Reported L. R.* 3 *Ch.* 420.]

THIS was a suit by a pecuniary legatee for the administration of the estate of William Curtis, who died in 1857, having by his will, made in 1851, devised the residue of his real estate to the defendant, and having given a legacy of £2,000 to the plaintiff. The will is set out fully in the report of the case in the court below. (L. R. 2 Eq. 627.)

The suit came on to be heard before *Vice-Chancellor Kindersley* in 1864, when he decided on the construction of the will that there was no charge, express or implied, of the legacy on the residuary real estate, and directed accounts accordingly.

The chief clerk made a certificate, from which it appeared that the debts of the testator at the time of his death amounted to £12,968, and that his personal estate amounted to about £5,000. At the date of the certificate all the real estate directed to be sold for the payment of debts had been sold, and the executors had received on account thereof, and on account of the personal estate, £9,444, and had paid debts to the amount of £8,632; and the balance in their hands, with the outstanding personal estate, amounted to £1,410. Including interest and other debts not yet proved, it was stated at the bar that the debts still unpaid would amount to about £7,670, leaving upwards of £6,200 charged on the residuary real estate after the personalty and the real estate directed to be sold for the payment of debts were exhausted.

The suit came on for further consideration upon the certificate, and the Vice-Chancellor Kindersley then decided that by the operation of the Wills Act a residuary devise of real estate was no longer specific, and that therefore the pecuniary legatee was entitled to marshal as against the residuary devisee, and ordered the accounts to be taken accordingly. The decision on this question is reported.

The residuary devisee appealed against this order, and the pecuniary legatee appealed against the original decree in the suit.

Mr. Glasse, Q. C., for the residuary devisee.

Mr. Bristowe (with *Mr. Glasse*).

Mr. Green, Q. C., and *Mr. Shebbeare*, for the legatee.

Mr. Woodhouse, for the trustees of the will.

LORD CHELMSFORD, L. C., after stating the will and the facts, continued: —

In support of the plaintiff's appeal it was contended that the legacy of £2,000 to the testator's granddaughter was either expressly or impliedly made a charge upon the residuary real estate devised to the grandson; that the question was one of intention, and that the testator clearly intended his granddaughter to have her legacy; and,

having given away all his personal estate, he must have known that it would not be paid unless she could have recourse to the real estate. That, although the words "charged in manner hereinafter mentioned" appeared to refer solely to the annuity of £120 given to the testator's wife, yet they were capable of application to a further implied as well as to the express charge. That the case of *Webb* v. *Webb*, Barn. Ch. 86, showed that an express charge did not exclude another charge by implication, and that the amount of the testator's personal estate being wholly insufficient for the payment of his debts, it must necessarily be inferred that, intending a benefit to his granddaughter, he meant that her legacy should be paid out of the only fund available for the purpose.

There can be no doubt that, according to *Webb* v. *Webb*, a testator may use express words of charging in one part of a will, and may create a charge by implication in another part of it; but where, in a will, an express charge of a particular debt or legacy is laid upon land, it is a strong indication that the land is not intended to bear any other charge of a like nature. This exclusion of an intention, however, will give way to a necessary implication to the contrary; but, to use the words quoted by Lord Eldon in *Bootle* v. *Blundell*, 19 Ves. 521, the intention of the testator "must be collected from the words, not from circumstances out of the will; and upon general principles and established rules, not by a liberal power of conjecture upon the supposition of what a man would do in the like circumstances; that the court cannot go into the inquiry, whether the personal estate is sufficient for the payment of all the debts, as that would establish a general rule that, where the personal estate is insufficient, the intention must be taken to be to charge the land." I do not feel myself at liberty to regard the insufficiency of the personal estate to pay the testator's debts as a ground for implying an intention that the £2,000 legacy should be a charge on the real estate. Where the meaning of a will is doubtful, the court may assist its construction by evidence of the state of the testator's property at the time when it was made; but where the words are plain, no such extrinsic aid can be resorted to, to give them a different meaning. In this case, the language of the will is too clear to require or to permit any foreign means of interpretation. The words "charged in the manner hereinafter mentioned," followed by a particular charge, are capable of only one construction; and it would be doing violence to the plain meaning of such words to construe them as if they were to be read "in manner hereinafter expressly or impliedly mentioned." I think that in this respect the Vice-Chancellor's decree was quite correct, and that the plaintiff's petition of appeal must be dismissed.

Upon the question raised by the defendant's appeal, one cannot help remarking that the practical effect of the part of the order to which it is directed is inconsistent with the decree which has just been considered. The Vice-Chancellor rightly decided that the legacy of £2,000 was not

a charge on the residuary real estate, but by his declaration as to marshalling he has virtually made it such a charge. His Honor declared that the residuary estate devised to the defendant, John L. Curtis, ought to be applied in payment of the testator's debts in aid of the legacy, and that the plaintiff, Rebecca L. Hensman, was entitled to be recouped out of the said residuary real estate the amount due in respect of the legacy, thus making the residuary estate which he held to have been not intended to be charged, bear the whole burden and charge of the plaintiff's legacy.

The question to be determined upon the appeal of the defendants is one of importance and difficulty. It is admitted that if the case had arisen before the late Wills Act the legatee would not have been entitled to marshal the assets against the residuary devisee, because the residuary devise would only have passed the specific estate of which the testator was seised at the date of his will. But it is said that the Wills Act has produced an entire change in the nature of a residuary devise of land, and by enacting that every will shall be construed, with reference to real estate (as well as personal), to speak and take effect as if it had been executed immediately before the death of the testator, has taken away the specific character of a residuary devise, and brought it within the operation of the equitable doctrine with respect to the marshalling of assets. It certainly could not have been in the contemplation of the Legislature that by making a will extend to after-acquired property, they were placing a residuary devise of real estate on an entirely new footing as to the administration of a particular branch of equity; nor is it easy to understand why the Act should be supposed to have impressed every residuary devise with a new character, although the testator may not have become possessed of any real estates after the making of his will, merely by enacting that after-acquired estates shall pass by such residuary devise. Suppose the will expressly declared that no real estate subsequently acquired by the testator was intended to pass, the residuary devise would, I presume, be as specific as before the Act; and yet, according to the argument, although the testator had no other real estate at the time of his death than he had when his will was made, by the mere force of the Wills Act that which otherwise would have been definite and specific, is rendered as general and indeterminate as if it were the bequest of a residue of personal property.

Lord Cottenham, in *Mirehouse* v. *Scaife*, 2 Myl. & Cr. 706, in describing the difference between a gift of personal and of real estate, said: "When a testator gives the residue of his personal estate, he knows that it will be uncertain, till his death, what will be comprised in that gift. But it is certain that the gift will operate upon part only of what he may be possessed of at his death, all debts, funeral expenses, and other charges, being to be paid out of it; and the expression necessarily imports what will remain after all charges are defrayed. On the other hand, the testator knows precisely upon what real estate such a

gift will operate, unless there be charges affecting the land beyond what the personal estate can satisfy." Can it then be said that a testator knows less precisely upon what real estate his devise will operate because the Act makes the will speak and take effect from immediately before his death instead of from the date of his will. In both cases the testator knows equally well what real estate he possesses, and in both the whole not previously disposed of is embraced by the residuary devise. Why, then, should the gift be regarded as specific in the one case, and not in the other? It is said that a residuary devise since the Wills Act must be general because at the time it is inserted in the will the testator is ignorant to what property it may eventually extend. But as at the time when, by the Act, the testator is supposed to be speaking it must be certain what real estate will be included in the devise, I do not see how any previous uncertainty in the mind of the testator between the date of the will and the time when it is to take effect can make any difference. In either case it is the essentially precise and definite nature of the subject of the devise which gives it its specific character and not the scope and extent of its operation.

I am aware that in the view I am expressing I am encountering opposite opinions of deservedly high authority; but I cannot think that the Wills Act has indirectly given to legatees any right of marshalling assets as against residuary devisees, which they did not previously possess.

But although I am of opinion that the legatee cannot by marshalling throw the whole of her legacy upon the residuary devised estate, yet neither do I think that she ought to lose the whole in consequence of the exhaustion of the personal estate in payment of the debts. The testator intended that the legatee should have her legacy, as well as the devisee the devised estate. But she will be entirely disappointed if the devisee is not made to bear a proportion at least of the debts which the personal estate was insufficient to satisfy. Vice-Chancellor Knight-Bruce, in *Tombs* v. *Roch*, 2 Coll. 502, laid down an equitable principle which is applicable to the present case, namely, that "every will ought to be read as in effect embodying a declaration by the testator that the payment of his debts shall be as far as possible so arranged as not to disappoint any of the gifts made by it unless the instrument discloses a different intention." And, in accordance with the decision of that very learned and able judge in that case, I shall hold in the present case that the legatee and the residuary devisee must contribute *pro rata* to satisfy the debts of the testator which his general personal estate was insufficient to pay.

I must, therefore, reverse the order of the Vice-Chancellor, and declare that the plaintiff, Rebecca L. Hensman, the legatee of the legacy of £2,000, and the defendant, John L. Curtis, the residuary devisee, are liable to contribute to the debts of the testator which his general personal estate is insufficient to satisfy, according to the respective values of the said legacy and of the estates devised. And

there must be an inquiry what are the relative values of the legacy and of the devised estate to each other, and the legatee and the devisee must contribute to the debts of the testator which his general personal estate is insufficient to satisfy in proportion to the values of their respective interests.

NOTE. — See *Lancefield* v. *Iggulden*, L. R. 10 Ch. 136 (1874).

But where there were specific devises, and a residuary devisee, and the testator directed that all his land should be charged with the payment of his legacies, the legacies were held to be charged only on the land comprised in the residuary devise. *Conron* v. *Conron*, 7 H. L. C. 168 (1858).

COLLINS *v.* LEWIS.

CHANCERY. 1869.

[*Reported L. R.* 8 *Eq.* 708.]

JAMES DEW, who died in 1864, by will, made in 1861, gave certain pecuniary legacies, and then devised to the use of his wife for her life all his real estate, situate at Woodlands, in the parish of St. Briavels, Gloucestershire, and after her death he gave the same to his trustees, with all the residue of his real and personal estates, upon trust for his niece for life, with remainder for her children. The executors renounced probate, and the niece, who was the testator's heiress-at-law, became legal personal representative, and finding insufficient personalty to pay the testator's debts, but considerable real estate, she filed this bill for an administration of the trusts. The question was, whether the legacies were payable out of the realty, the pecuniary legatees contending that the legacies were charged upon the real estate in case the personalty should prove insufficient to satisfy them.

It now appeared that the personal estate amounted to the sum of £483 10*s.* 2*d.*, and the debts of the testator to the sum of £2,063 6*s.* 8*d.*

Mr. C. Browne, for the plaintiff, submitted that the legacies were not charged on the testator's realty.

Mr. Hughes, Q. C., for the defendants, the trustees, mentioned the case of *Hensman* v. *Fryer*, L. R. 3 Ch. 420, and, upon the authority of that case, said that where the personal estate was insufficient for the payment of the legacies the legatees had a right to resort to the realty, or to have the debts marshalled.

Mr. Bedwell, for the testator's widow.

The legatees had been served with notice of this hearing on further consideration, but did not appear.

SIR JOHN STUART, V. C. Upon principle as well as upon authority it is the settled law of the court that the personal estate not specifically bequeathed must be first applied in payment of debts before the real

estate which passes under a residuary devise can be resorted to. A pecuniary legatee has no right whatever to call upon a residuary devisee to contribute to the payment of debts.

The decision in the case of *Hensman* v. *Fryer* is clearly a mistaken decision; I must therefore decline to follow it. The declaration will be, that these legatees have no right to resort to the real estate for payment of their legacies.[1]

HAYS *v.* JACKSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1809.

[*Reported* 6 *Mass.* 149.]

THE petitioners alleged, and proved by the requisite documents from the probate office, that the personal estate of the testator was insufficient, by the sum of 66,000 dollars, for the payment of his just debts and legacies, and thereupon prayed that they might be licensed to convey so much of the real estate, of which he died seised, as should be sufficient to pay these debts and legacies, with the charges of sale.

Upon notice ordered, the heirs at law appeared, and sundry questions arose, all of which are discussed in the following opinion of the court, which was delivered by

PARSONS, C. J. Henry Jackson made his last will on the 13th of January, 1805, in which he makes the following dispositions of his estate: —

First. After all his just debts and funeral charges are paid, he gives to such of his nephews and nieces as may survive him, fifty dollars each. Also he gives to his sister Susanna Gray, in fee, certain specific real estate, on condition that she does not demand against his estate her portion of her father's estate remaining in his hands; and his executors are to hold the real estate, thus devised her, upon the same trusts as he held her said portion.

Also, he gives to Mrs. Hepzibah C. Swan, in fee, *all the remaining* part of his estate, real and personal, of which he might die seised, or which might afterwards descend to him, by gift, grant, as heir at law, or otherwise, to be held in trust by his executors, for her sole use and disposal.

And he appoints Judah Hays and Elisha Sigourney, his executors.

Mrs. Swan, the residuary legatee, and also the heirs at law, are before us.

The testator was seised of other real estate than that specifically devised to Mrs. Gray, when he made his will; and he afterwards

[1] See, *accord.*, *Dugdale* v. *Dugdale*, L. R. 14 Eq. 234 (1872); *Tomkins* v. *Colthurst*, 1 Ch. D. 626 (1875); *Farquharson* v. *Floyer*, 3 Ch. D. 109 (1876).

acquired other real estate, which, on his death, without a republication of his will, descended to his heirs.

It appears that the personal estate, left by the deceased, is insufficient to pay all his debts. The heirs contend that the lands, which would pass by the residuary devise to Mrs. Swan, shall first be applied to the payment of the debts, before the descended lands can be called for. On the other side, Mrs. Swan and the executors, who are her trustees, insist that the descended lands are first to be appropriated to the payment of the debts.

Whether we are authorized, on this petition, to marshal the assets, and if we are, in what manner they are to be marshalled, are the questions before the court.

The case may at first be considered as at common law, and according to the equitable rules established for marshalling assets, where there is a will.

At common law, the lands of a testator are not assets, in the hands of the heirs, for the payment of any but specialty debts, where the heir is expressly bound by the contract. And his lands are not bound for the payment of any of his debts in the hands of a devisee, unless charged by the testator, either generally or specially, in his will. To prevent the injustice of the testator in devising his lands without charging them with the payment of his debts, the Statute of 3 & 4 W. & M. *c.* 14, was passed, by which the lands in the hands of a devisee are made assets for the payment of debts due on specialties. Since that Statute, all the lands of the testator, whether they descend or are devised, are charged by law with the payment of creditors by specialty, who may also resort to the personal estate. But creditors by simple contract can avail themselves only of the personal estate, and of such of the lands as are charged in the will with the payment of debts; unless when they take the place of creditors by specialty, who have been paid out of the personal estate. These rights of the creditors remain uncontrolled by any provisions which a testator can make.

But as between legatees and devisees who claim under the will, and the heirs who can take only what the testator has not given away, he may regulate the funds, out of which his debts shall be paid, by which regulations they will be bound.

And the general rule in equity for marshalling assets is thus settled: 1. The personal estate, excepting specific bequests, or such of it as is exempted from the payment of debts. 2. The real estate which is appropriated in the will as a fund for the payment. 3. The descended estate, whether the testator was seised of it when the will was made, or it was afterwards acquired. 4. The rents and profits of it, received by the heir after the testator's death. And, 5. The lands specifically devised, although they may be generally charged with the payment of the debts, but not specially appropriated for that purpose. And this rule is executed by a decree in chancery, according to the rights of the parties respectively interested.

The laws of this Commonwealth, applicable to this subject, may next be considered. And here all the personal estate of the testator, and all the real estate, of which he died seised, whether devised or not, are assets for the payment of all his debts, whether due by simple contract or by specialty. Also by the Statute of 1783, *c.* 24, § 10, all estate, real or personal, undevised in any will, shall be distributed as if it were intestate, and the executor shall administer upon it as such.

A question has been made, whether the executor must take out administration on such undevised estate, or whether he shall administer it, *ex officio*, as executor. The usage has been to administer it without a letter of administration; and we are satisfied that this usage is correct. There can be no benefit to any person, from having two accounts opened by the executor in the probate office; and the natural construction of this section supports the usage. For the executor, by the probate of the will, has the administration of the testate estate, *according to the will*, and on undevised estate he is also directed to administer agreeably to the provisions respecting intestate estate.

According to the strict rules of law, there can be no undevised personal estate in a will, where an executor is appointed; for he has all the personal estate, whether acquired before or after the will, in trust, — first, to pay the debts, and then the legacies; and if any remained, it was his own, unless the testator, by his provision for the executor, had excluded him from it; in which case he was trustee of the remainder for the next of kin.

As questions frequently arose, whether the executor was excluded from the residue or not, the section of the Statute above cited removed all doubt; and the executor is now, in all cases, trustee of the undisposed residue for the next of kin.

As to the distribution of undevised lands, this section is merely affirmative of the common law, which gives to the heir all undevised estate. But by the obligation imposed on the executor to administer it as intestate estate, it becomes assets in his hands for the payment of the testator's debts; and it may be sold by the executor, on license for that purpose, or a creditor may take it in execution.

There is another provision, applicable to this subject, in the 18th section of this Statute, where it is enacted, that whenever a testator in his will shall give any chattels or real estate to any person or persons, and the same shall be applied to satisfy the debts of the testator, all the other legatees, devisees, or heirs, shall refund their proportionable part of such loss, and contribution may be compelled by suit.

From this view of our Statute provisions, it is manifest that a testator cannot, by any dispositions in his will, affect the rights of creditors, who may, if their debts are not discharged, enforce satisfaction by the levy of their executions on any estate, which was the testator's at his decease; the whole of it being assets in the hands of the executor. But it is also manifest that the testator may bind, by his dispositions, his legatees, devisees, and heirs.

Hence result the right and duty of the court, in the due exercise of its jurisdiction, so to marshal the assets, that as little interruption be given to the interests of the claimants under the will, and of the heirs, as may consist with the more perfect rights of creditors. This can be done only by a designation in the license of the estate, which the executor may sell for the payment of debts. And when the testator, or the law, has appropriated an adequate fund for the payment of the debts, it would be unreasonable for the court to permit that fund to lie by, and to license an executor to sell a specific devise, and thus drive the specific devisee to his action at law, for relief out of the appropriate fund.

In what manner the assets are in this case to be marshalled, is the next question. And in our opinion, the rule established in equity, in cases where all the debts are due by specialty, is applicable in this case, except as it relates to the rents and profits of the descended estate, received after the testator's death, which we cannot come at. For in those cases, the whole estate, personal and real, as well the devised as the descended lands, are assets for the payment of all the debts. So here the whole estate of Jackson, the testator, including the descended real estate, is assets for the payment of all his debts, in the hands of his executors. And in both cases the charge on the estate is by operation of law.

In this will there is no specific bequest of any chattel, and no exemption of any part of the personal estate from the payment of debts. Therefore the whole of the personal estate, after the payment of the expenses of the last sickness, funeral charges, and of the debts due to the Government (if any), is first to be applied to discharge the debts. It is also very clear, that the devise of lands to Susanna Gray is a specific devise, not liable, by the terms of it, to any deduction. The descended estate must then be applied to the payment of the debts, before the specific devise can be resorted to. And the same rule must apply to the lands which Mrs. Swan can claim as residuary legatee, if the devise of those lands can be considered as specific within the intention of the rule.

Jackson first provides that his debts and funeral charges be paid. He next bequeaths legacies to his nephews and nieces, and makes a specific devise to his sister, Susanna Gray. Then he gives to Mrs. Swan, in fee, all the remaining part of his estate, real and personal; the just construction of which is, "when my debts and funeral charges, and the legacies, are paid, and the specific devise to my sister is deducted, then what remains, whether real or personal, I devise in fee to Mrs. Swan." If nothing should remain, then nothing is devised to her.

We cannot therefore consider this devise of the remainder as specific. It is rather creating a fund for the payment of the debts and legacies, with a devise of what remains, if any, to the residuary devisee. If, after the personal estate was exhausted by the debts, the unsatisfied

creditors should levy their executions on all the devised lands, excepting those specifically devised to Mrs. Gray, Mrs. Swan could not compel contribution by Mrs. Gray and the heirs, under the Statute, because a general residuary legatee cannot have contribution, if nothing remains. For in that case nothing is given to him, but on a contingency that some estate may remain; and if no estate shall remain, then nothing devised to him is taken from him, to satisfy a creditor of the testator. The debts and legacies, being first to be paid, are to be considered as a deduction from the property contemplated to be given; and if, after the deduction, there is no remainder, the contemplated bounty has wholly failed, there being, in fact, no object on which it could operate.

Thus, when the testator, after mortgaging lands, devised them, with a clause, that the devisee pay off the mortgage, he can resort to no other part of the estate for relief; but the money secured is considered as a deduction from the property devised. But the case of *King* v. *King et Al.*, 3 P. Wms. 358, is in point. There the testator, being seised of freehold lands, and of a copyhold, which last he had mortgaged, devised the copyhold to his nephew; and *after all his debts were paid*, he devised the rest of his estate, real and personal, to his son, who was his heir. And it was holden that the import of this devise was, that until all the debts were paid, nothing was devised to the son; or that when the debts should be paid, then, and then only, he should be entitled to the residue. We cannot, therefore, consider this residuary devise to Mrs. Swan as specific, within the rule of marshalling assets, so that the descended lands shall first be sold.

It has been argued by the counsel for the petitioners, admitting the rule to be generally correct, yet that in this case it ought not to apply, because in the residuary devise the testator gives, not only all his real and personal estate, of which he was then seised and possessed, but all of which he might afterwards die seised; and, therefore, that he contemplated after-acquired estate, which, although it could not pass by his will, yet was evidently intended to pass; and that this intent ought to be so far executed as to cause it to be sold for the payment of debts, before the residuary devise should be applied for that purpose.

This argument, however ingenious, is not solid. For the testator cannot, in his will, charge with the payment of his debts after-purchased lands, any more than he can devise them. And if in this case he intended it, the intent was void. And an intent against law cannot affect this rule or principle of law. Otherwise the rights of the heirs would be implicated by a testamentary disposition, made before the lands were acquired by the testator. If this case should be allowed as an exception, it would involve most residuary devises; for it is common for the scrivener to include expressly all the residue of the estate, of which the testator may die seised or possessed. We think, therefore, that the rule should be applied in this case, without admitting the exception.

The order of the court was entered as follows: —

Ordered that the said executors be, and they hereby are empowered and licensed to raise the sum of by sale at public auction of the houses, lands, or tenements, of which the said Henry Jackson died seised in fee, being devised by him by his last will and testament; excepting such part thereof as is therein devised in trust for his sister, Susanna Gray, and such as may have been held by said Jackson to the use of, or in trust for, any other person or persons; the said sum, when raised, to be applied to the payment of the debts aforesaid, with the incidental charges of sale; and if the said sum cannot be raised by such sale, it is further ordered, that the said executors may raise by sale at public auction of so much of the real estate of which the said Jackson died seised, not having devised the same in and by his last will and testament, such further sum of money, as with the money raised by the sale first above ordered, will amount, in the whole, to the said sum of to be applied as aforesaid, giving bond, &c.

Otis and *Sullivan*, for the petitioners.

Prescott and *Jackson*, for the respondents.[1]

[1] "It seems by the English authorities, that residuary devises have been regarded as specific, on the ground that a testator could dispose only of the lands owned by him when his will was made, and therefore that a residuary devise was a gift of such lands only; and that the lands devised were subject to the rule of marshalling assets, which leaves specific devises untouched, if the general legacies and devises are sufficient, with the other property, to pay the testator's debts. 2 Jarman on Wills, 547. It may well be doubted whether this rule of the English law was ever adopted in this Commonwealth. For though Parsons, C. J., seems to have recognized it, incidentally, in *Wyman* v. *Brigden*, 4 Mass. 151, cited by the plaintiff's counsel, yet in the subsequent case of *Hays* v. *Jackson*, 6 Mass. 149, he held that a residuary devise, like that which was made to the present plaintiff, could not be considered as specific, within the rule of marshalling assets. And the court, upon a petition for license to sell real estate for the payment of a testator's debts, ordered the estate, given to the residuary devisee, to be sold, before selling that which was specifically devised.

"But we are of opinion, that since the Rev. Sts. *c.* 62, § 3 ["Any estate, right or interest in lands, acquired by the testator, after the making of his will, shall pass thereby in like manner, as if possessed at the time of making the will, if such shall clearly and manifestly appear by the will, to have been the intention of the testator"], have enabled testators to devise lands acquired after the making of their wills, by clearly manifesting, by their wills, their intention so to do, the English rule above mentioned, if it ever was in force here, can exist no longer." — *Per* METCALF, J., in *Blaney* v. *Blaney*, 1 Cush. 107, 116 (1848).

NOTE. — On the exoneration, in general, of the personalty by the realty, see *Inchiquin* v. *French*, 1 Cox, 1 (1745); *Watson* v. *Brickwood*, 9 Ves. 447 (1804); *Bootle* v. *Blundell*, 1 Mer. 193 (1815); *Kilford* v. *Blaney*, 29 Ch. D. 145 (1885); *Lee, Appellant*, 18 Pick. 285 (1836).

On the apportionment of the charge of a debt or legacy when laid on a mixed fund of realty and personalty, see *Stocker* v. *Harbin*, 3 Beav. 479 (1841); *Elliott* v. *Dearsley*, 16 Ch. Div. 322 (1880).

On applying to the payment of debts land devised to the heir, see *Biederman* v. *Seymour*, 3 Beav. 368; p. 27 *ante*.

SECTION IV.

EXONERATION OF MORTGAGED PROPERTY.

ONEAL *v.* MEAD.

CHANCERY. 1721.

[*Reported* 1 *P. Wms.* 693.]

ONE seised of a real estate in fee, which he had mortgaged for £500, and possessed of a leasehold, devised the former to his eldest son in fee, and gave the latter to his wife, and died, leaving debts which would exhaust all his personal estate, except the leasehold given to his wife.

The question was, whether there being (as usual) a covenant to pay the mortgage moneys, the leasehold premises devised to the wife should be liable to discharge the mortgage?

Obj. The personal estate is the natural fund for debts, and according to the decree made by his Honor in *Sir Peter Soame's Case*, where the father the mortgagor dying intestate, and leaving a mortgage upon his real estate made by himself, the personal estate was applied to pay off the mortgage, whereby the younger children were left destitute: so by the same reason, in this case, the leasehold, though specifically devised to the wife, yet being personal estate, must be liable to pay the debt due by the mortgage; especially in favor of the heir, who otherwise would be very slenderly provided for, and in a worse condition than his younger brothers.

But the MASTER OF THE ROLLS [SIR JOSEPH JEKYLL], after taking time to consider of it, and being attended with precedents, decreed that as the testator had charged his real estate by this mortgage, and on the other hand specifically bequeathed the leasehold to his wife, the heir should not disappoint her legacy by laying the mortgage debt upon it, as he might have done, had it not been specifically devised; and though the mortgaged premises was also specifically given to the heir, yet he to whom they were thus devised, must take them *cum onere*, as probably they were intended. That by such construction each devise would take effect, (viz.) the leasehold estate go to the devisee thereof, and the heir enjoy the freehold, though subject to the burden with which the testator in his lifetime had charged it; and this resolution did not in the least interfere with that of *Clifton and Burt*, 1 P. Wms. 678, because in the latter there was no mortgage.[1]

[1] See *Halliwell* v. *Tanner*, 1 Russ. & Myl. 633 (1830).

SERLE *v.* ST. ELOY.

CHANCERY. 1726.

[*Reported* 2 *P. Wms.* 386.]

ONE seised in fee of lands near Godalmin in Surrey, that were in mortgage, and likewise seised in fee of other lands, devised his lands in Godalmin to his cousin and god-daughter Jane Styles at her age of twenty-one, *subject to the encumbrances that were thereupon*, and ordered that the rents and profits of the premises should, during the infancy of his said god-daughter, be paid to her father for her sole use, and devised other lands to trustees, in trust to pay the testator's debts.

Obj. The lands in Godalmin are devised *subject to the encumbrances thereupon*, for which reason the devisee must take them *cum onere*, and be contented to pay off the mortgage.

MASTER OF THE ROLLS [SIR JOSEPH JEKYLL] *contra.* The devise of the estate subject to the encumbrance is no more than what is implied, for the testator could not do it otherwise; but when the testator devises other lands to pay his debts, this must be intended all his debts, and consequently the debt by mortgage of Godalmin is part of those debts which are to be paid off out of the money arising by sale of the trust-estate; and this is the stronger, by the testator's having appointed the rents and profits during the infancy of his god-daughter to be paid to the infant's father for the sole use of the infant, which is as much as to say, that they shall not go or be applied in discharge of the mortgage.

And though the infant by her own bill had submitted to pay off this mortgage, yet his Honor said, he must take care of the infant, and not to suffer her to be caught by any mistake of her agent.

Wherefore paying the costs of the day, let the infant amend her bill.[1]

[1] See *Hale* v. *Cox*, 3 Bro. C. C. 322 (1791); *Waring* v. *Ward*, 5 Ves. 670 (1800); 2 Jarm. Wills (4th ed.) 634, 635.

A devisee of land which the testator has mortgaged is entitled to exoneration out of land descended to the heir. *Galton* v. *Hancock*, 2 Atk. 424 (1742). *Wride* v. *Clark*, 2 Bro. C. C. 261 *n.* (1766).

EVELYN *v.* EVELYN.

CHANCERY. 1732.

[*Reported* 2 *P. Wms.* 659.]

UPON a bill brought by the plaintiffs, the three infant daughters of George Evelyn by Mary his wife, for raising their portions of £8,000 (the eldest of the said daughters being about the age of eight years) the case was thus:[1]

George Evelyn the defendant's father (and grandfather to the plaintiffs) had three sons John, George, and the defendant Edward Evelyn.

George Evelyn the father being tenant for life, remainder to his eldest son John in tail male, of part of the premises, on the 20th October 1698, together with his eldest son John, by deed and recovery settled the manor of Walkhamstead alias Godstone in Surrey, to the use of himself for life, *sans* waste, remainder to his eldest son John Evelyn for life, remainder to his first, &c. son in tail male successively, remainder to his second son George Evelyn for life, remainder to his first and other son in tail male successively, remainder to his third son the defendant Edward Evelyn in like manner, with trustees to support all these contingent remainders, remainder to the heirs male of the body of George Evelyn the father, remainder to him in fee; with a power to George Evelyn the father by deed or will, to charge by lease, mortgage or otherwise, the premises to himself limited for life, with raising or paying any sum not exceeding £6,000, with farther power to his said sons, respectively, when in possession, to make any lease or leases for years for the raising of portions for the daughters of such sons.

By other indentures of lease and release dated the 20th and 21st of October 1698, George Evelyn the father, in consideration that his son John Evelyn had joined with his father in the said common recovery and settlement, did settle other lands, (viz.) the manor of Tandridge, &c. of which he was seised in fee, to the same uses as the said manor of Walkhamstead alias Godstone was settled by the former deed.

Upon the 1st of April 1699, George Evelyn the father, in pursuance of his power, mortgaged part of the said land for £1,500 for the term of 1,000 years, which mortgage afterwards by mesne assignment became vested in Sir Thomas Pope Blunt, with a covenant from George Evelyn the son for payment of the mortgage-money, and Sir Thomas the mortgagee covenanted to re-assign to George Evelyn the son. In June 1699 George Evelyn the father died. In October 1703, John Evelyn

[1] This case is abbreviated from the report; only that part being given which relates to the question of the mortgage.

the eldest son died without issue, upon which George Evelyn the second son entered upon the premises comprised in the settlement.

August 22d 1720, upon the intermarriage of George Evelyn the son with the daughter of Mr. Garth, George Evelyn, by indenture, granted and leased to trustees all the premises in the settlement, to hold to them for the term of 500 years for the purpose of raising £8,000 for the portions of the daughters of the marriage.

The marriage took effect; but afterwards in the year 1724 George Evelyn died intestate, leaving the defendant Mary his widow and only three daughters, who by their mother in the year 1725 brought their bill against Edward Evelyn and James Evelyn his eldest son (being the next remainder-man in tail) praying a present sale of the 500 years term to raise the portions, the eldest daughter being not above four years old at the time of bringing the bill; and on the other hand the defendant Edward Evelyn and his son (the next remainderman in tail) brought their cross bill against Mrs. Evelyn the mother (afterwards married to Governor Bohun) being the administratrix of her former husband George Evelyn, praying that the personal estate of her late husband should be applied towards paying off the mortgage of £1,500, and in exoneration of the real estate.

These causes coming on at first before the *Master of the Rolls* in the absence of the *Chancellor*, he was pleased to declare, that the powers in the deeds of the 20th and 21st of October 1698 were well executed, and directed, that it should be referred to the Master to state the value of the real, and also of the personal estate of George Evelyn the late husband of Mary; whereupon the Master stated the real (beyond the jointure) to be £91 *per annum*, the personal estate to be about £4,000 and the debts (besides the mortgage) to be about £200 and afterwards these causes being ordered to be set down for hearing before the Lord Chancellor upon the Master's report, and for further directions, and upon the petition of Edward Evelyn and James Evelyn his son to his Lordship, alleging that they apprehended themselves aggrieved by such part of his Honor's decree, whereby the powers in the deeds of the 20th and 21st October 1698 were declared to be well executed, in regard the petitioners conceived that however the term might be well raised, yet that the said powers touching the trusts were not well declared, nor well executed or warranted by the abovementioned deeds: it was therefore ordered that these causes should be set down to be re-heard touching the matters in the petition mentioned, at the same time that the matter of the Master's report was set down for hearing.

And now the cause standing for judgment in the paper, the LORD CHANCELLOR [KING], assisted by the LORD CHIEF JUSTICE RAYMOND and MASTER OF THE ROLLS [SIR JOSEPH JEKYLL], delivered the resolution of the court.

First. As to the question, whether the personal estate of George Evelyn the son should be applied to pay off the mortgage made by

George Evelyn the father, in regard the son covenanted to pay this mortgage money, whereupon the mortgage was to be re-assigned to him, or as he should direct:

It was agreed that the personal estate of the son should not be applied to pay off this mortgage made by the father, forasmuch as the charge was made by George Evelyn the father in pursuance of his power to charge the premises; and as he had such power, the defendant Edward must be contented to take the land *cum onere;* that this being the original debt of George Evelyn the father, though his personal estate, if any such were to be found, would be liable thereto, yet the son's personal estate ought not to be charged with the father's debt; and notwithstanding that the son did afterwards, on the assignment to Sir Thomas Pope Blunt, covenant to pay the mortgage money, yet since the land was the original debtor, this covenant from the son would be considered only as a surety for the land; that it was not like the case of *Sir John Napier* [5 Bro. P. C. (Toml. ed.) 221], where part of the estate of Sir John the mortgagor, was after his death settled by a private Act of Parliament in trustees as a fund to pay all his debts, and Sir Theophilus the son and heir of Sir John disposing of that fund, was consequently answerable for the debts, having had the benefit of the fund set apart for them, for which reason it was but just that upon his death his personal estate should be answerable for the debts of his father; whereas in the present case here was no fund for payment of debts that came to the son, but the land was the original debtor, and must continue so, there being nothing substituted in its place; that in the common case where a mortgagor covenants to pay and dies, though *quoad* the mortgagee, the land may be looked upon as the security on which he relies, yet if the mortgagor covenants to pay and does receive the money, he is the original debtor, and his personal estate shall go to ease the land in favor of the heir. But here George Evelyn the son was not the original debtor, his father was, who actually received the money; that in the case of the *Earl and Countess of Coventry* [2 P. Wms. 222], where Gilbert late Earl of Coventry on his marriage with the daughter of Sir Strensham Masters, (the earl being but tenant for life with a power to make a jointure of lands not exceeding £500 *per annum* on any wife he should marry) covenanted in consideration of the intended marriage, that he or his heirs would after the marriage, according to the power given him by his father's will or otherwise, settle lands of £500 *per annum* on his wife for her jointure; and it being in proof that the late earl directed his steward to look over his rent-rolls for a fit parcel of the estate to make good the jointure, and afterwards the jointure deed was drawn and engrossed, but not executed; though this depended only on a covenant, yet the jointure of land being the chief thing in view, the decree was, that the land should be settled, and the covenant not made good out of the personal estate. In like manner, in the case of *Freeman and Edwards* [2 P. Wms. 435], though the wife's jointure and the daughter's portion were

secured by articles which were never completed by a settlement, however those articles being to settle lands, and the covenantor leaving lands sufficient to answer it, it was decreed that the daughter's portion should be raised out of the lands, and the personal estate of Mr. Freeman the covenantor not be applied in exoneration of the land. So that as to that part of the cross bill, which prayed the mortgage-money should be paid out of the personal estate of George Evelyn the son, the same was dismissed with costs.[1]

LUTKINS *v.* LEIGH.

CHANCERY. 1734.

[*Reported Cas. Temp. Talb.* 53.]

BENJAMIN KNIGHT having mortgaged his freehold lands to Mr. Ainscomb for securing the sum of £2,500 in 1729, made his will in these words: "As touching my worldly estate, after payment of my debts and funeral charges, which I will to be first paid, I give my freehold estate in Kent to my wife for life, chargeable with an annuity of £30 for life to Elizabeth Knight;" and after his wife's death he devises his said freehold estate, so charged, to the children of his three sisters, and directs the residue of his personal estate to be placed out at interest; his wife to have the interest during her life, and after her death to be divided among the children of his three sisters; and gave his wife £1,500, with a proviso that the devises and bequests in the will should be accepted by the wife in lieu of her dower, and in full satisfaction of her share of the personal estate.

The question was, whether the personal estate should be applied in exoneration of the real, so as to defeat the pecuniary legatees; there not being sufficient to pay the £1,500 in case the personal estate should be applied in exoneration of the real.

Mr. Attorney-General, for the widow.

LORD CHANCELLOR [TALBOT]. This point has been so far determined, that it seems quite settled and clear; where a man leaves his real estate charged, the legatees and simple contract creditors have a right to stand in the room of bond creditors, if these latter run away with the personal estate; and this in order to do justice both to the testator's intent, and likewise to the creditors. Indeed where the contest is between the heir and executor, and there is either a mortgage or bond wherein the heir is bound, the heir shall always prevail to have the personal estate applied; but that is only where no prejudice is done either to a simple contract creditor or legatee: and had there been no devise of the land in this case, the widow and the other legatees would have had a right to apply to this court, and to stand in the room of the

[1] See, *accord.*, *Lacam* v. *Mertins*, 1 Ves. Sr. 312 (1749); *Ancaster* v. *Mayer*, 1 Bro. C. C. 454 (1785).

mortgagee if he fell upon the personal estate, that being the proper fund for their legacies, and to have so much of the real estate, as he had out of the personal: but here the real estate is devised away; which gives the legatees rather a stronger claim than when they have to do with an heir-at-law; since it was a long time before a devisee could prevail with this court to have the personal estate applied in exoneration of the real, as appears from many ancient cases, which distinguish in that case between a devisee and an heir-at-law; though at last he has prevailed where there is no damage done to a third person: but it has been endeavored here to put him in a better condition than the heir; and to that end has been cited 1 Salk. 416. There is a great difference between that case and this; for, a bond affects not the real estate in the testator's hands; nor did it the devisee, until the Statute of Fraudulent Devises; nor, before that Statute, did it affect the heir, if he had aliened before the writ brought: but in case of a mortgage, that is a lien upon the land both in the hands of the testator and the devisees, and in whose hand soever the land comes. Thus the court has gone as far as is reasonable, viz., to put the *hæres factus* in as good a plight as the *hæres natus;* but not in a better. So the legatees must have the legacies out of the personal estate in case the mortgagee keeps to the real; and if he falls upon the personal, they have a right to stand in his room for so much out of the real estate as he shall take out of the personal; that being a proper fund for their payment.[1]

PARSONS *v.* FREEMAN.

CHANCERY. 1751.

[*Reported Ambl.* 115.]

LORD HARDWICKE, C.[2] It is a general rule in questions between heir and executor, the heir and real estate is favored: so where there is an

[1] See *Johnson* v. *Child*, 4 Hare, 87 (1844).

[2] The facts of that part of this case to which the above judgment has reference, appear from Lib. Reg. to have been as follows: By indentures of 1st and 2d October, 1739, between Joseph Spencer and Thomas Nicholl of one part, and —— Freeman of the other part, after reciting a lease made by indenture of 29th May, 1728, by Joseph Spencer to Sophia Oakley, for the term of 300 years, of certain lands, for securing £50 and interest, and that by mesne assignments, the said mortgage term was vested in the said Thomas Nicholl; the said Thomas Nicholl, in consideration of £86, and by the direction of the said Joseph Spencer, assigned the residue of the term of 300 years in the said lands; and the said Joseph Spencer, in consideration of £4, granted the said premises to the said —— Freeman his heirs and assigns forever. By a receipt indorsed upon the indenture, it appeared that the £4 was paid, and that Joseph Spencer executed the said indenture, but it did not appear that the said Thomas Nicholl did, or that he ever received the £86. But by an agreement dated the 18th day of September, 1739, made between said —— Freeman and J. Spencer, it appeared that ——

encumbrance on real estate, the duty by which encumbrances are created being a personal demand on the owner himself, the heir-at-law shall have benefit of the personal estate to exonerate the realty; and so by the latter determination shall the *hæres factus*. In *Galton and Hancock*, the court went a great way farther. Those are cases where the owner of the estate, as well as the estate, is liable; but if the ancestor has done no act to charge himself personally, the heir-at-law must take the estate *cum onere;* so if one purchase the equity of redemption with usual covenants to pay off the mortgage, I know of no determination upon such a case, but am inclined to think the heir could not come to have the estate exonerated. That is not the present case, which is an agreement with the vendor for purchase of an estate for a gross sum of £90 to be paid, £86 of it to the mortgagee, and £4 to the mortgagor.

Q. If the heir-at-law can come into this court, and have the estate exonerated by the personal estate? Am of opinion he may, for two reasons:

1st, It is an express contract to pay, and the representative of the mortgagor might maintain an action for the money, and so might the mortgagee oblige the mortgagor to let him make use of his name to recover the money. This is as strong a case as can well come before the court.

2d, It being agreed to be part of the purchase-money, the heir would (if there was nothing more in the case) be entitled to have the money paid out of the personal estate, as where one articles to purchase an estate, and dies before the purchase is completed.

Therefore decree, &c.

Freeman agreed to pay £90 for the purchase, viz., £86 to Thomas Nicholl for principal and interest, and £4 to J. Spencer; and by another agreement dated 18th September, 1739, reciting that —— Freeman had agreed to purchase the premises, and pay the principal and interest on the mortgage, and that he had paid £6 to the said Thomas Nicholl for interest, Thomas Nicholl promised upon payment of £80 to convey the said premises. The decree declared, "that the said lands were descended to the plaintiffs, as heirs-at-law of said testator, subject to the principal and interest remaining due on the mortgage, to Thomas Nicholl, and that plaintiffs were entitled to have what should appear to be so due for principal and interest, discharged and satisfied out of the personal assets of said testator." It will be seen from the facts, as stated above from the Lib. Reg., that the decision in the present case is not at variance with the doctrine laid down in *Tweddell* v. *Tweddell*, part of the mortgage debt having been paid by the purchaser to the mortgagee. — BLUNT'S NOTE.

See *Oxford* v. *Rodney*, 14 Ves. 417 (1807).

TWEDDELL *v.* TWEDDELL.

CHANCERY. 1786.

[*Reported* 2 *Bro. C. C.* 101.]

THIS bill was filed by Francis Tweddell, devisee for life of an estate called High Laws, under the will of John Aynesley his grandfather, and John Tweddell eldest son of Francis, against the personal representatives and next of kin of John Aynesley, praying, amongst other things, to have the personal estate of John Aynesley aforesaid, applied in discharge of a mortgage subsisting upon the High Laws estate. And the case made by the bill was as follows:

That by indentures of lease and release, by way of mortgage, dated the 9th and 10th of February, 1737, the release being made between John Aynesley of the first part, William Aynesley of the second part, and Edward Delaval of the third part, in consideration of £1,776 therein mentioned, to be paid to John Aynesley, for the proper debt of William Aynesley, and £224 therein mentioned, to be paid to William Aynesley by the said Edward Delaval, making together £2,000, the said John Aynesley, with the approbation of William Aynesley, bargained and sold the estate called High Laws, &c., to hold to the said Edward Delaval in fee, subject to a proviso for redemption on payment of £2,000 and interest.

That John Aynesley afterwards agreed to purchase the estate of William Aynesley, and thereupon, by indentures of lease and release, of the 29th and 30th of April, 1747, made between William Aynesley of the one part, and John Aynesley of the other part, reciting the mortgage of Delaval, and also reciting, that the said John Aynesley, by articles of agreement entered into between him and the said William Aynesley, had contracted with the said William Aynesley for the absolute purchase of the inheritance of the said premises, and had agreed to pay the sum of £3,500 for the same, in manner therein mentioned; (that is to say) to Francis Blake Delaval (son and heir-at-law of Edward Delaval) all such sums of money as should be due to him, for principal and interest, upon the said mortgage, on the first of May then next; as also to pay, or secure to be paid, to the said William Aynesley, all such sums of money as should remain of the said £3,500 after deducting the money due to Delaval; and also reciting, that, upon the first of May then next, there would be due from the said estate, to the said Francis Blake Delaval, the sum of £2,155 subject and liable to the payment whereof the said John Aynesley was to take the said premises, and which sum being deducted from the £3,500 there would remain in the hands of John Aynesley £1,345 to be paid by the said John Aynesley to the said William Aynesley, on the conveyance being made. It was witnessed, that the said William Aynesley, in consider-

ation of the performance of the said articles on his part, and of the said sum of £1,345 to him paid, or secured to be paid, by the said John Aynesley, did grant, &c., to the said John Aynesley, his heirs and assigns forever, all the said premises, &c., and the common covenants were therein contained, and, in the covenant against encumbrances, the mortgage and securities made to the said Edward Delaval for the £2,000 and interest, were excepted; and the said John Aynesley did thereby, for himself, his heirs, executors and administrators, covenant and agree with the said William Aynesley, his heirs, executors, and administrators, that he the said John Aynesley, his heirs, executors, and administrators, should well and truly pay, or cause to be paid, to the said Francis Blake Delaval, his heirs, executors, administrators, and assigns, the said sum of £2,155 in manner aforesaid, and would at all times thereafter indemnify the said William Aynesley, his heirs, executors, and administrators, and his and their goods and chattels, lands, and tenements, from all costs and charges, &c., in respect of the said mortgage to Edward Delaval.

That John Aynesley, by his will, dated 5th January, 1748, devised the said premises (together with the other real estates), but subject nevertheless to the payment of all his just debts and legacies, to John Reid, his heirs and assigns, forever, to the use of his first son John Aynesley for life, and, after the determination of that estate, to trustees to preserve contingent remainders, but subject nevertheless, after payment of his just debts and legacies, but not sooner, to permit and suffer the said John Aynesley to receive the rents and profits during his life, and, after his death, to the first and other sons of John Aynesley the son, in tail-male; remainder to the issue-female of John Aynesley the son, as tenants in common; remainder to the testator's two daughters, Mary and Anne, during their lives, as tenants in common; remainder to plaintiff Francis Tweddell (son of testator's daughter Mary) for life; remainder to trustees to preserve, &c.; remainder to the first and other sons of Francis Tweddell in tail-male, with other remainders over; and, after giving some legacies, the testator did thereby charge and make liable the rents and profits of all his real estates, to the payment of all his just debts and legacies; and, after reciting that his estate at High Laws was then in mortgage to Francis Blake Delaval for £2,000, he the said testator did thereby direct and give full power and authority to his trustee John Reid, his heirs and assigns, to take and receive the rents and profits of all his said real estates, as well for the payment to the said Francis Blake Delaval of the debt of £2,000 and the interest thereof, as all his the said testator's other just debts and legacies, and outgoings, in such order and manner as his said trustee should think proper. But the testator made no disposition of the residue of his personal estate.

As to so much of the said bill, as prayed that any part of the personal estate of John Aynesley, the testator, might be applied in payment of the mortgage for £2,000 and interest upon the estate at High

Laws, the defendant, John Tweddell, demurred; for that the said plaintiffs have not shown any title to have such personal estate so applied.

This demurrer was argued the 31st July, 1784, when the Lord Chancellor thought it ought to be overruled; but, upon application of defendant's counsel, it was set down to be re-argued; and it was re-argued the 17th and 20th December, 1784; and two questions were made. First, whether from the nature of the contract, the personal estate of John Aynesley was liable to be applied in discharge of the mortgage. Secondly, if it were not so from the nature of the contract, whether John Aynesley had made it liable to be so applied by his will.

Mr. Attorney-General, *Mr. Scott*, and *Mr. Mitford*, for the demurrer.

Mr. Madocks and *Mr. Lloyd*, for the plaintiffs.

The Lord Chancellor directed this cause to stand for judgment the second day of Hilary Term; but, his Lordship's illness intervening, he did not give judgment to this day.

Lord Chancellor Thurlow. This comes before me on a demurrer, and the question is, whether the personal estate shall be applied for the benefit of the heir, in discharge of a mortgaged debt upon real estate. It arises upon the following case (stating the case). The point is, whether the personal estate shall be exempted or not from the payment of this charge. It is a clear rule that the personal estate is never charged in equity, where it is not at law, and, if not chargeable at law, there is no principle, or case, in this court to warrant its being chargeable in equity, contrary to the order of the law. There is no case expressly decided, upon the subject upon which I am now to give my opinion. However, the grounds, upon which former cases have been decided, apply to the present: particularly that case, where a grandfather bought an estate charged with a mortgage, and it descended to the father; and the father, having occasion to borrow money, charged the estate with that sum, entering into a covenant, charging himself, at law, with the payment. This transaction, certainly, changes the nature of the debt, and makes it his own. This principle I think applicable to the present point. *Cope* v. *Cope*, 2 Salk. 449, was the first case cited at the law. There is another case in 2 Wms. 659, *Evelyn* v. *Evelyn*. The principle is more expressly laid down in that case. The land was the original debtor, and the mortgagee could not bring his action against the executor, or any other party, but merely against the original debtor. As to the case in 1 Chancery Cases, 74, nothing more is to be gathered from thence, than the general rule: *Cornish* v. *Mew*, Ch. Ca. 271; *Pockley* v. *Pockley*, 1 Vern. 36, show, that where a purchaser of an equity of redemption dies, the personal estate shall not be applied for the benefit of the heir, it not being the ancestor's debt.

Where it is a debt payable by executors, at law, this court will relieve the heir, by turning the charge upon the executors, provided it does not interfere with other debts and legacies, or any more substantial claims, 1 Wms. 347; 2 Wms. 664; 1 Vesey, 312. In respect of

the rule of marshalling assets, it is, that it must be a debt affecting both the real and personal estate; so, in case the personal fund proves deficient, to enable the court to marshal the assets, you must prove the executors are accountable at law, and not in equity. There is a case abridged in 6 Brown's Cases in Parlt. 520, *Lord Rochford* v. *Belvidere* (which his Lordship stated). I cannot distinguish that case from this; the House of Lords were of a different opinion to what I entertain upon this case, and therefore I have stated it more at length. The personal estate never was liable, and the party never was liable to an action upon covenant. In that case George had a fee-simple in the estate; he was capable of giving it after the charges were extinguished; however, it was held, contrary to my opinion, that the personal estate was liable. As to the present case, let the demurrer be allowed; as my opinion is that the personal estate never was liable, either by action against the party himself, or against his executors.

Demurrer allowed.[1]

WOODS *v.* HUNTINGFORD.

CHANCERY. 1796.

[*Reported* 3 *Ves. Jr.* 128.]

RICHARD and Alice Huntingford were seised of certain estates for their lives with remainder to their eldest son John in fee. By indentures of the 4th of December, 1758, in consideration of £200, stated to have been paid to Richard, Alice, and John Huntingford, they mortgaged part of the premises to Carter for 1,000 years; and subject to that mortgage conveyed the same to such uses as John should appoint; remainder to Richard for life; remainder to John in fee. A fine was levied; and Richard and John covenanted for payment of the mortgage money. In fact the money was borrowed and applied for the benefit of John only. The mortgagee assigned to Betts; and he in 1763 assigned to Wright; in which transaction all the said parties again joined; £100 more was advanced; and Richard and John again covenanted for payment of the money. By deed of the 23d of February, 1767, reciting, that the money had really been borrowed for the benefit of John, that he had covenanted with his father and mother to indemnify their life-estates from these several mortgages, that no interest had been paid for the said £300 by the said John Huntingford or John Bullen, the trustee, but all the interest accrued from the mortgage to Wright was still in arrear, and that John Huntingford, being desirous to be discharged as well from the payment of the principal sum of £300 as the arrear of interest, and all that should grow due, which

[1] Affirmed on rehearing. 2 Bro. C. C. 152.

See *Cumberland* v. *Codrington*, 3 Johns. Ch. 229 (1817); 2 White & T. L. C. Eq. (5th ed.) 711, 712.

arrear and growing interest, he apprehended, would with the said principal sum before the death of Richard and Alice Huntingford, or before the said John should come into possession of the mortgaged premises, amount to the value of the fee-simple thereof, had applied to Richard Huntingford to take upon himself the payment of the same, and to save harmless him, John Huntingford; and that in consideration thereof, he would convey and assure all his right, title and interest, in the premises to Richard Huntingford and his heirs, the said estates were conveyed with all the usual covenants from John for farther assurance and indemnity; and Bullen, the trustee, was directed to stand seised to the use of Richard; who covenanted to pay all the arrears due upon the mortgage. Richard Huntingford afterwards borrowed a farther sum of £40 from Wright, and made a new mortgage to him for the whole sum of £340.

Upon these facts the question was between the heir and the younger children, whether the mortgaged premises were to be exonerated by the personal estate of Richard Huntingford. The cases cited were from Mr. Cox's collection in the note to *Evelyn* v. *Evelyn*, 2 P. Wms. 664, and *Hamilton* v. *Worley*, 2 Ves. Jr. 62.

The Master of the Rolls. [Sir Richard Pepper Arden.] This is one of the most doubtful questions, I have ever had to determine. When it is stated, it will occur to every one, that perhaps no point has given rise to more cases or more nice discriminations and distinctions. All the cases of any considerable weight have been very judiciously and accurately selected by Mr. Cox in his note upon the case of *Evelyn* v. *Evelyn*. The bench, the bar and the public in general, are much obliged to him for his very valuable edition of those very valuable reports. He has there in as short a note, as the subject would admit, put together all the cases, and selected all the material points both of fact and reason. Almost all the cases, that were quoted at the hearing, are brought together in that note; and he has there stated the rules respecting this question so accurately and shortly, and so well extracted the principles from all the cases, particularly *Tweddell* v. *Tweddell*, which is a very governing case, that I would rather refer to his words than use my own. I have taken the more time to consider this case, because the inference, I draw from these transactions, is different from that, Lord Thurlow drew from the transactions in *Tweddell* v. *Tweddell;* for I am of opinion, that what has been done here is sufficient to make this the personal debt of the vendee; and I have taken great pains in order to show, that my determination does not in any degree contradict the principle there established. I shall state the grounds, upon which I think, this case differs from that. It may be said, they are nice: but they are the only grounds, that can exist; unless you lay down at once, that the debt never can be made the personal debt of the vendee, unless by his expressly declaring, that it shall be his personal debt. It comes to this point only, whether by acts it

may not be necessarily inferred, that he meant to make it a debt of his own. *Tweddell* v. *Tweddell* is very fully reported twice in 2 Bro. C. C. 101, 152; and has many expressions in it, which so fully govern my opinion, that I cannot wholly omit them. Lord Thurlow begins by stating, that in the first place it is absolutely necessary, the executor should be liable at law; for if not, it is impossible there can be any equity in the heir to call upon him to pay out of the personal estate, when he would not be liable to pay at law. But though he may be liable at law, it does by no means follow, that he shall be equally liable in equity, where both the personal and real estate descending upon the same person are liable to the debt. In the known case of an obligation binding both the heir and executor, the heir has a right to call for exoneration out of the personal estate; which must be first applied. Where by the original contract the personal estate is the original debtor, and the real only a collateral security, it is much stronger in favor of the heir. Then this case has arisen. A man makes a contract pledging both his real and personal estate; the latter by a general obligation; part or the whole of his real estate as a specific pledge by way of mortgage. That estate descends upon his son as heir at law: the personal estate goes to the executor; and the question is, who pays the debt. It was a mixed debt of the father; but the son's only as owner of the collateral pledge; and he has a right to call upon the personal estate. Therefore if a person succeeding to an estate of that kind has done no act to adopt the debt and make it his personal debt, his personal estate is not liable: but if by his acts he has put himself so far in the place of his ancestor as to make the debt his own, that is understood to be the same as if he was the original mortgagor: but the court has been extremely anxious not to make that inference, unless where it is perfectly clear and obvious; therefore though, the mortgagee pressing for his money, the heir is obliged to have a transfer of the mortgage, and, as every one knows, no assignee will take it without some personal covenant, upon that transaction he executes a bond to the new mortgagee, if he does it only for that purpose, not meaning to make himself more liable, it has been determined not to make it the personal debt of the party, whose original debt it was not. It has been attempted to prove, that what Richard Huntingford has done comes to that case, and that he joined only for that purpose. Most of the cases in Mr. Cox's note are of that kind: *Tweddell* v. *Tweddell* is of a different nature. That was not the case of a mortgaged estate descending upon the heir; but it was a purchase of an estate subject to a mortgage. There was no communication with the mortgagee: but upon the sale there was a mere covenant of indemnity against the mortgage by the vendee. That is strongly relied on by Lord Thurlow. In commenting on *Tweddell* v. *Tweddell* he does not seem to disapprove the case of *Parsons* v. *Freeman;* but seems to agree with Lord Hardwicke's reasoning, and recognizes the principle, as far as it can be taken from the short note in Ambler. He intimates

his doubt of *Lord Rochford* v. *Belvidere;* upon which therefore I shall not rely; as there are many difficulties occurring against that judgment, though by so high an authority. *Tweddell* v. *Tweddell* amounts only to this: that where a man buys subject to a mortgage, and has no connection or contract or communication with the mortgagee, and does no other act to show an intention to transfer that debt from the estate to himself as between his heir and executor, but merely that, which he must do, if he pays a less price in consequence of that mortgage, that is, indemnifies the vendor against it, he does not by that act take the debt upon himself personally.

It remains to consider, whether in this determination I do infringe upon that principle. I should be extremely sorry to do so; and have taken so much time in order to be sure, I do not. It is very unpleasant for a judge, where an inference is to be drawn from equivocal acts; and the facts, upon which the decision turns, are distinguished by such nice lines. This is a sale of the estate by John Huntingford to Richard: who takes upon himself the payment of this money; to which before he was liable at law, and John both at law and in equity. The question is, whether that transaction, and the subsequent loan of £40 and new mortgage by Richard acting as owner, did not make the debt his own? I cannot collect, that Lord Thurlow said, a man never could make a debt his own without an express declaration; and no case short of that can have that effect, if this is not sufficient. I am of opinion, that under all these circumstances Richard has clearly adopted the debt and made it his own, though primarily the debt of his son in equity and of himself and his son at law. The transaction in 1767, and the subsequent one with Wright, show he meant to put himself in his son's place; who has therefore a right to be exonerated out of the personal estate.[1]

SCOTT *v.* BEECHER.

CHANCERY. 1820.

[*Reported* 5 *Mad.* 96.]

JOHN TYSON being entitled to a copyhold estate to him and his heirs, according to the custom of the manor, mortgaged the same on the 9th October, 1811, to Richard Mills, to secure £1,000 and afterwards surrendered the same to Mills and his heirs pursuant to the covenant in the mortgage deed. Tyson also gave his bond to Mills for payment of the money advanced. The mortgage money was not paid at the appointed time.

Tyson died in November 1814, and by his will, 14th December 1813, devised all his estate and effects to his wife, Elizabeth Tyson, and in

[1] See *Oxford* v. *Rodney*, 14 Ves. 417 (1807); *Gould* v. *Winthrop*, 5 R. I. 319 (1858); 2 White & L. R. C. Eq. (5th ed.) 712, 713.

particular his copyhold estate, and appointed her executrix; and she proved the will, and was admitted to the copyhold, subject to the mortgage; she died in May 1816, without issue, leaving her brother, the plaintiff, heir at law, according to the custom of the manor.

In February 1819, letters of administration of the unadministered estate of John Tyson were granted to the plaintiff and the defendant Frances Beecher, the wife of the other defendant Alexander Beecher, and upon the death of Elizabeth Tyson, letters of administration of her estate, were also granted to the plaintiff and the said Frances Beecher.

Richard Mills, the mortgagee, threatened to proceed to recover by ejectment the mortgaged premises, whereupon the plaintiff filed the present bill, insisting that he ought to have the mortgage paid out of the personal estate of the mortgagor, he having left assets more than sufficient for that purpose, and the prayer of the bill was accordingly.

The defendants by their answer admitted that the assets of James Tyson were more than sufficient for the payment of his funeral expenses and debts, including the mortgage debt and interest thereon, and that E. Tyson had in her life-time possessed assets of James Tyson more than sufficient to pay all debts, including the mortgage, and that at her death there was also outstanding of James Tyson sufficient to pay the mortgage; but they submitted, that under the circumstances, the plaintiff must take the copyhold estate, subject to and chargeable with the mortgage debt, and that he was not entitled to have the personal estate applied in discharge of the mortgage.

Mr. Pepys and *Mr. Walker*, for the plaintiff.

Mr. Lovatt and *Mr. Palmer*, for the defendants, were stopped by

THE VICE-CHANCELLOR. [SIR JOHN LEACH.] Elizabeth Tyson was devisee of the copyhold estate, and was also residuary legatee and executrix of the mortgagor. If she had thought fit, she might have paid off the mortgage out of the personal estate of her husband, for it is admitted that she possessed assets sufficient to pay all the debts, including the mortgage, and it may therefore be said that she elected to continue the mortgage as a charge on her real estate. But I apprehend this is not a case in which her personal representative is bound to make out any such fact of election. By the gift to her as residuary legatee, the personal estate of James Tyson became her personal estate, but the mortgage debt of James Tyson was not her debt, and her heir therefore has no equity to pay off this mortgage out of her personal estate. *The bill was dismissed with costs.*[1]

[1] See *Ilchester* v. *Carnarvon*, 1 Beav. 209 (1839); *Clarendon* v. *Barham*, 1 Y. & C. C. C. 688 (1842); *Bruce* v. *Morice*, 2 De G. & Sm. 389 (1848); *Swainson* v. *Swainson*, 6 De G. M. & G. 648 (1856). But cf. *Bond* v. *England*, 2 K. & J. 44 (1855).

MIDDLETON *v.* MIDDLETON.

CHANCERY. 1852.

[*Reported* 15 *Beav.* 450.]

THE question arose on the will and codicil of Charles John Middleton. By his will, dated the 28th of February, 1831, he expressed himself as follows: "I desire and direct that all my debts, funeral and testamentary expenses, and all legacies herein mentioned, or which by any codicil to this my will I may hereafter give or bequeath, may, in the first place, be paid and satisfied out of my personal estate, or if that should prove insufficient, out of my real estate; and I hereby charge the same upon my personal and real estates respectively in the hands of my devisees and executors hereinafter named." He then devised his freehold, leasehold, and copyholds "in England, or wheresoever situate, to trustees and their heirs forever, in pure trust, subject to debts, expenses, and legacies, as aforesaid, to suffer and permit" his wife to enjoy them for life, and after her decease, to his brother, H. J. Middleton, for life, with remainders over. He bequeathed all his personal property to his wife absolutely, subject to certain pecuniary legacies. He then, after reciting that he possessed estates in the East and West Indies, devised his lands, &c. in the colonies to his wife and her heirs absolutely, "subject only to payment of debts, expenses, and legacies, as aforesaid; for his will and intention was, to bequeath to her all he possessed, and to create an interest in his lands and real estate in England only, after her decease, as detailed above."

The testator had a copyhold estate at Midanbury, in Hampshire, and a share in a freehold estate in Jamaica. He afterwards purchased two houses in Calcutta, and by a codicil made in 1835, after reciting he had purchased these two houses in Calcutta, he proceeded thus: "Now I desire and direct, that these tenements shall follow the uses of my will now in England, and in the event of my demise, shall become the sole property of my wife, to be enjoyed and disposed of by her as fully and entirely as if I had myself been alive."

On the 12th of January 1843, the testator borrowed the sum of £1,500 from Messrs. Child, his bankers, and he gave his bond of that date for securing the repayment, together with an equitable mortgage on the Midanbury property.

The testator died in January 1844; and a bill having been filed for the administration of his estate, it was found, that the personal estate was insufficient for the payment of the debts, that a small balance of £15 remained unapplied, and that there was still a debt by simple contract, of £194, and that the debt of £1,500, to Messrs. Child & Co.,

secured by the bond and equitable mortgage of the copyhold property at Midanbury, still remained unpaid.

The Master, to whom the matter was referred, found, that the English property of the testator was confined to this estate at Midanbury, and that his property abroad consisted of one seventh of one tenth of certain freehold estates in the island of Jamaica, and of one of the two houses at Calcutta, mentioned in his codicil of the 6th of April 1835.

The cause now came on for further directions on the Master's report; and a question was raised between the widow of the testator, on the one hand, and his brother and other devisees in remainder of the Midanbury estate, on the other, whether the devisees of that estate were to take it *cum onere* — that is, subject to this mortgage of £1,500 — or whether the estates abroad, devised to the widow absolutely, were to contribute towards the payment of this £1,500 so charged on the Midanbury property.

Mr. Lloyd and *Mr. Selwyn*, for the plaintiff, the widow of the testator.

Mr. R. Palmer, for the defendants.

The Master of the Rolls reserved his judgment.

The Master of the Rolls. [Sir John Romilly.] The question in this cause arose on the construction of the will and codicil of Charles John Middleton, who made his will on the 28th of February 1831, republished it on the 2d of January 1834, and afterwards executed a codicil to it on the 6th of April 1835.

The will is to this effect: After directing that his real estate shall be liable, in the case of the deficiency of the personal estate, to contribute to the payment of debts and legacies, and after giving some specific and small pecuniary legacies, he devises all his property in England to his widow for her life, and after her decease, to his brother H. J. Middleton for his life, and after his decease, to the eldest male heir of his body absolutely; and in default of any such male heir, he directs the property to be divided between Charles Edward Jerningham and the eldest daughter of H. J. Middleton, as tenants in common in fee simple; then, after reciting that he was possessed of property in the colonies, he gives the whole of his property abroad to his wife absolutely. By the codicil executed by him in 1835, he mentioned that he had purchased two houses at Calcutta, and, that in order that he might not die intestate with respect to them, he desired them to go to the uses of his will then in England — that is, that they were to go to his wife absolutely. By this codicil, he says nothing respecting the payment of debts and legacies.

The cases of *Oneal* v. *Mead*, 1 P. Wms. 693, and *Hallikell* v. *Tanner*, 1 R. & M. 633, were relied upon by the widow, the devisee of the colonial estate, for the purpose of showing, that the devisees of the Midanbury estate must take it *cum onerè*, and that they cannot throw any portion of this charge on the other estates. It is the settled

rule of this court, that if, in the absence of any special direction, a testator devises an estate to one devisee, and personal property to a legatee, the devisee must take the estate as he finds it; and that if the personal estate should be exhausted by the mortgagee in payment of his debt, the legatee may marshal the assets and stand in the place of the mortgagee, in order to throw that debt on the real estate. This is *Clifton* v. *Burt*, 1 P. Wms. 679, and there are several other cases to the same effect.

The case of *Oneal* v. *Mead* simply established, that, as between a devisee of a mortgaged estate and a specific legatee of a leasehold estate, the devisee should not be entitled to have his mortgage paid by a specific legatee.

Halliwell v. *Tanner*, also relied upon, was to the same effect. Three leaseholds were, in that case, bequeathed to three legatees; one was mortgaged: the two other legatees were held not to be bound to contribute towards the payment of the mortgage charged on the first leasehold estate. These cases are, in truth, instances of the same principle, and of the doctrine already stated. The devisees and legatees are all equally objects of the testator's bounty, and one cannot be permitted wholly or partially to defeat the gift to another, by reason of any rule of law, which makes the property so given to that other legatee previously liable to pay the debts of the testator. These are only instances of giving effect to the intention of the testator found in the words he has used; but this case is distinct from those, and it is, in my opinion, in no further respect governed by them, than by showing that the expressed intention of the testator is to be followed. Here the testator directs, in the first place, that if his personal estate should prove insufficient, his debts should be paid out of his real estate, and the question is, whether the devisees do not take subject to this direction.

In *Carter* v. *Barnadiston*, 1 P. Wms. 505, which was relied upon for the devisees in remainder of the English estates, it was so determined, in a case where the testator had devised all his real estates to trustees, in trust, out of the profits to pay his debts and legacies; and after these had been discharged, he devised the estates at Orton to one set of devisees, and the estate at Pickworth to another, and he afterwards mortgaged the Pickworth estate. The Orton estate was, in that case, held liable to contribute to the payment of the mortgage charged upon the Pickworth estate.

In *Irvin* v. *Ironmonger*, 2 R. & M. 531, the will began with a general charge of debts and funeral expenses, and, subject thereto, the testator gave all his freehold, copyhold, and leasehold estates to trustees in trust to pay annuities and legacies, and, subject thereto, in trust for certain persons, in the manner there stated. The Master of the Rolls held, that, so far as the personal estate not specifically bequeathed was insufficient to pay the debts, they must be borne by the freehold, copyhold, and leasehold estates proportionably.

These cases, in my opinion, govern the present; nor am I able to

find any well-founded distinction, as applicable to the question before me, between these cases and the present, arising from the circumstance, that there was, in the cases cited, a devise to trustees in trust for the payment of debts, and that in this a charge for the payment of debts is created. That a devise of an estate in trust for the payment of debts, and a charge of debts on the real estate, are distinct in their nature and consequences, is a proposition familiar to every one; but, as applicable to the question before me, they are, in my opinion, the same, if it appear, from the plain import of the words of the will, that the charge of all debts is general upon all the estates of the testator.

I am of opinion, that this is the true import of this testator's will, and that in this case, the real estate generally must bear the expense of paying all the debts, whether they be simple contract debts, or charged on any particular portion of the real estates. In the first place, the will, after containing the general direction, that if the personal estate should prove insufficient, the debts and legacies should be paid out of the testator's real estate, contains a repetition of this direction as applicable to each devise. This is so after the gift of the Midanbury property; and after giving to his wife Eliza all his lands in the colonies, to be held absolutely by her heirs and assigns forever, without remainder to any one, the testator proceeds to say, "subject only to payment of debts, expenses, and legacies as aforesaid."

If I were to hold, that these lands were not to contribute, it would be a violation of these words in the will, and it would be, in effect, to hold, that where the testator has said that the lands shall be subject to the payment of debts, this court may say they shall not, in fact, be so subject.

The after-acquired property in the East Indies is, in my opinion, subject to the same trust, as it passes by the codicil, which directs that the houses, one of which still forms a portion of the testator's property, "shall follow the uses of his will then in England," and must therefore be enjoyed by her as her absolute property, subject to the contribution I have before mentioned. This, therefore, manifestly points to the same end, and to the payment of debts and legacies.

I must declare, therefore, that the Jamaica and Calcutta estates are liable to contribute with the Midanbury estate, to the payment of the £1,500, in proportion to their relative values; and if evidence of such proportionate values be not laid before me, or if the parties interested do not, or cannot, agree as to the values thereof, I must refer it to the Master to ascertain the value accordingly. The rest of the decree will be of course, and according to the minutes prepared by counsel.[1]

[1] See *Harper* v. *Munday*, 7 De G. M. & G. 369 (1856).

LOOSEMORE *v.* KNAPMAN.

CHANCERY. 1853.

[*Reported Kay*, 123.]

By an indenture, dated the 31st of January, 1833, and made between William Knapman of the first part, Sarah Loosemore of the second part, and Samuel Robert Topping and Robert Loosemore of the third part, after reciting that a marriage had been agreed upon, and was intended shortly to be solemnized, between the said William Knapman and Sarah Loosemore, and reciting the title of William Knapman to certain real estates, and that, *on the treaty for the said intended marriage, it was agreed that the said William Knapman should secure to the said Sarah Loosemore*, during the joint lives of herself and him the said William Knapman, an annuity or yearly sum of £50 for her separate use by way of pin money, and also *during the life of her the said Sarah Loosemore, in case she should survive him the said William Knapman, an annuity or yearly sum of* £200 *by way of jointure and in bar of dower in manner thereinafter expressed:* It is witnessed, that, in pursuance of the said agreement, and in consideration of the said intended marriage, and pursuant to and by force and virtue and in exercise and execution of the several powers and authorities (therein referred to), and of every or any other power or authority in anywise enabling him in this behalf — he the said William Knapman, with the privity of the said Sarah Loosemore, his intended wife, (testified by her being a party to and executing the settlement in manner therein mentioned,) appointed that the several freehold messuages or tenements and hereditaments thereinafter described, with the appurtenances, should thenceforth go, remain, and be to the use of the said Samuel Robert Topping and Robert Loosemore, their executors, administrators, and assigns, for and during and unto the full end and term of 500 years, fully to be complete and ended, without impeachment of waste. Nevertheless, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations thereinafter declared and contained of and concerning the same. And it is further witnessed, that, in further pursuance of the said agreement, and for the consideration aforesaid, and for the nominal consideration therein mentioned, the said William Knapman, with the privity of the said Sarah Loosemore, testified as aforesaid, and by way of further assurance only, granted and demised unto the said Samuel Robert Topping and Robert Loosemore, their executors, administrators, and assigns, the said hereditaments (therein described), to hold the same, with the appurtenances, unto the said Samuel Robert Topping and Robert Loosemore, their executors, administrators, and assigns, thenceforth for and during and unto the full end and term of 500 years fully to be complete

and ended, without impeachment of waste. Nevertheless, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations thereinafter declared and contained of and concerning the same. And it is further witnessed, that, in further pursuance of the said agreement, and for the considerations aforesaid, the said William Knapman, with the privity, &c., of the said Sarah Loosemore, testified as aforesaid, demised unto the said Samuel Robert Topping and Robert Loosemore, their executors, administrators, and assigns, (certain leaseholds for long terms of years,) to hold the same unto the said Samuel Robert Topping and Robert Loosemore, their executors, administrators, and assigns, from thenceforth for and during all the remainder of the said terms, except only the last ten days thereof, at the yearly rent of a peppercorn, if the same should be lawfully demanded. Nevertheless, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, declarations, and agreements thereinafter declared and contained of and concerning the same. And the said William Knapman did thereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree, with and to the said Samuel Robert Topping and Robert Loosemore, their executors, administrators, and assigns, in manner following; that is to say, (amongst other things,) that, in case the said intended marriage should take effect, and the said William Knapman should depart this life in the lifetime of the said Sarah Loosemore, his intended wife, then, and in such case, the heirs, appointees, executors, administrators, or assigns of him the said William Knapman should and would, from and after such his decease, during the life of the said Sarah Loosemore, his intended wife, well and truly pay, or cause to be paid, unto her the said Sarah Loosemore, and her assigns, the yearly sum of £200, of lawful money as aforesaid, by four equal quarterly payments, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year, without any deduction or abatement thereout on any account whatever, the first of such quarterly payments to be made on such of the said last-mentioned days of payment as should first happen after the decease of the said William Knapman, if the said Sarah Loosemore should on that day be living. And, as well, as to and concerning the said several freehold messuages or tenements, hereditaments, and premises, so thereby appointed and demised to the said Samuel Robert Topping and Robert Loosemore, their executors, administrators, and assigns, with the appurtenances, during the said term of 500 years, as thereinbefore mentioned; as also, as to and concerning the several leasehold pieces or parcels of ground, messuages, or tenements and premises, so thereby demised unto the said Samuel Robert Topping and Robert Loosemore, their executors, administrators, and assigns, with the appurtenances, for the respective residues of the said terms of years save the last ten days thereof, respectively, as thereinbefore mentioned: it was thereby agreed and declared, between and

by the parties thereto, that the said Samuel Robert Topping and Robert Loosemore, their executors, administrators, and assigns, should stand and be possessed of and interested in the same several freehold and leasehold hereditaments and premises respectively, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, declarations, and agreements thereinafter declared and contained of and concerning the same; that is to say, upon trust *to permit and suffer the said William Knapman, his heirs, appointees, executors, administrators, and assigns respectively, to receive and take the rents, issues, and profits of the said several freehold and leasehold hereditaments and premises, with the appurtenances, to and for his and their own absolute use and benefit, until some default should happen to be made of or in the said annual sum of* £50 *or* £200, (as the case might be,) or some part thereof respectively, at or on the days or times and in the manner thereinbefore appointed for the payment thereof respectively; *and in case the said annual sum of* £50 *or* £200, (*as the case might be,*) *or any part thereof respectively, should happen to be behind or unpaid by the space of forty days next after the said days or times of payment thereof*, then upon further trust, for better securing to the said Sarah Loosemore, or such her appointees and assigns as aforesaid, the payments of the said several annual sums of £50 and £200 (as the case might be); and, for that purpose, upon trust, that they the said Samuel Robert Topping and Robert Loosemore, or the survivor of them, or the executors, administrators, or assigns of such survivor, should, from time to time, by and out of the rents, issues, and profits of the several freehold and leasehold hereditaments and premises, by demising, leasing, selling, or mortgaging the same premises, or any of them, or any part or parts thereof respectively, for all or any part of the said term of 500 years, as respects the said hereditaments therein comprised; and as to the said leasehold premises, for all or any part of the then residue of the said several terms of years, save and except the last ten days thereof respectively, or either of them, or by all or any of the said ways, or by any other ways or means, levy and raise such sum and sums of money as should be sufficient from time to time to pay and satisfy the said yearly sum of £50 or £200, (as the case might be,) or so much thereof as should from time to time happen to be in arrear and unpaid, together with all loss, costs, charges, damages, and expenses, which the said Sarah Loosemore, or such her appointees or assigns as aforesaid, or the said Samuel Robert Topping and Robert Loosemore, or the survivor of them, his executors, administrators, or assigns, should sustain, expend, or be put to for or by reason of the non-payment of the said yearly sum of £50 or £200, (as the case might be,) or any part thereof respectively, at the days or times and in manner thereinbefore mentioned for the payment thereof, and should pay, and apply, and dispose of the same moneys accordingly. And upon further trust, that they the said Samuel Robert Topping and Robert Loosemore, or the survivor of them, or the executors, administrators,

and assigns of such survivor, should permit and suffer the said William Knapman, his heirs, appointees, executors, administrators, or assigns respectively, to receive and take the residue or surplus of the rents, issues, and profits of the said several freehold or leasehold hereditaments and premises. And the settlement contained a proviso for cesser of the term on satisfaction of the said trusts.

The marriage was shortly afterwards solemnized. William Knapman died in August, 1835, having by his will confirmed the jointure of £200 to his widow, and devised the estates, subject thereto, to his son Henry Knapman, whom, together with the said Sarah Knapman, he appointed executor and executrix of his will.

From the testator's death until the death of Henry Knapman, in July, 1840, Sarah Knapman received the rents of part of the hereditaments, but not to a sufficient amount to satisfy her jointure during those years, and considerable arrears were due to her in respect thereof at the time of her death in March, 1852. Sarah Knapman died intestate, and John Loosemore became her legal personal representative, and also the administrator *de bonis non* &c., with the will annexed of William Knapman, her deceased husband. John Loosemore filed the bill in this suit against the trustees of the settlement of 1833, and against Mary Knapman, who, as devisee of all the real estate of Henry Knapman, was beneficially entitled to the hereditaments and premises comprised in the settlement, subject to the jointure, insisting that these hereditaments were primarily liable to the jointure, and praying for an account, and that Mary Knapman might be decreed to pay to the plaintiff what should be found due, upon taking such account, in respect of the jointure.

Mr. Rolt, Q. C., and *Mr. Elwin*, for the plaintiff.

Mr. Glasse, Q. C., and *Mr. G. Lake Russell*, for the defendants.

Vice-Chancellor Sir W. Page Wood. I think, although there is a distinction to be found in the cases, that I am bound on principle to hold that this is a charge primarily on the real estate. First of all, there is the decision of Lord Hardwicke in *Lanoy* v. *The Duke of Athol*, 2 Atk. 444. I believe there are prior cases, but that is the leading case on the subject. He says in effect, that, although where there is a covenant for payment the personal assets are first charged, this is not extended to provisions in a settlement; and the ground must be that which is pointed out in the argument in *Lechmere* v. *Charlton*, 15 Ves. 193, that, in a security of this description, there is not any benefit accruing to the personal estate of the party who is the debtor, but the whole arrangement is merely for the purpose of securing a jointure or portion; and the personalty not having received any benefit, the true intent is, that the real and not the personal estate should be the primary fund. That was the ground of the decision in *Graves* v. *Hicks*, 6 Sim. 398. In that case there was an agreement to secure a sum of £6,000 by way of mortgage; and the Vice-Chancellor takes a distinction which is nice, but of some importance, as to what

would have been the effect if the wording there had been different — if it had been an agreement to pay and not to secure the £6,000. (See 6 Sim. 403.) The use of the word "pay" might have been evidence of an anterior debt, as the question was, whether it was a debt at the time of the settlement. That question is asked here, and the answer must be, that no debt then existed. Then the question arises — which is the only difficulty occasioned by the peculiarity of this case — whether the form of the settlement is such as to indicate an intention that the personal estate is to be the primary fund; for such an intention must be expressed in the deed, if the principle is, that, there being no benefit to the settlor's personal estate, as between his real and personal representatives an intention is not to be *prima facie* imputed to him, of securing the debt on his personal estate. But the intention appears to me to be upon the whole frame of the deed, to make a charge by way of mortgage on real estate, as a provision by way of a settlement, which, as in *Graves* v. *Hicks*, must make the real estate the primary fund, unless clear evidence to the contrary be found in the deed. If the deed had contained a recital, that, "whereas on the said marriage William Knapman had agreed to secure an annuity of £200 by way of mortgage," the case would have been identical with *Graves* v. *Hicks*. That, however, is not the recital, but it recites an agreement to secure the annuity "in manner hereinafter expressed." If the settlor had said, I intend to secure it by way of mortgage, the deed would have been in this form: There would have been a covenant to pay the annuity, and a term created to secure it; and the deed would have contained a proviso that the mortgagor should hold until default, which is the common form of deeds of mortgage. No question could then have arisen. The case would have been like *Graves* v. *Hicks*. But the recital is merely that the security is to be made "in manner hereinafter expressed;" and the form of the deed is this: — There is first a demise for a term, upon the trusts thereinafter mentioned; and then there is a covenant to pay the jointure annuity at certain fixed periods; and then a trust to allow the settlor to hold until default, and forty days after default to raise the money. It occurred to me, that the defendants might say, supposing the lady, or her executors, to have sold before the forty days had elapsed, and to have been fortunate enough, by the effect of the proceeding, to have recovered the annuity, could the executors urge that the money was to be raised out of the land? The answer to that would be, that the court considers that the essence of the transaction is a mortgage, and the principle of *Lanoy* v. *The Duke of Athol* would apply, namely that where the personal estate takes no benefit, the election of a third party to sue upon the covenant would not disturb the equities of the parties; and although the personalty was obliged to pay the money before actual default, yet the real estate, and not the personal estate, was the primary fund, out of which it should come. I observe that the learned editor, in *Lechmere* v. *Charlton*, has printed the following part of the argument in italics:

"The cases *in which the personal estate is applicable in exoneration of the real estate, are all cases where a personal debt is contracted, by which the personal estate has been augmented and the real estate was only pledged.*" Probably the reason for doing so was, that that part of the argument shows the principle upon which the decision rested. I do not, however, rely upon that, but upon the decision in *Lanoy* v. *The Duke of Athol*, and the view which the Vice-Chancellor took, in asking, in *Graves* v. *Hicks*, whether any debt was due at the time? Asking the same question here, and it appearing that there was no debt, and no augmentation of the personal estate, I must hold, according to the authorities, that the transaction is to be regarded as a security made by the settlor upon his marriage, in which, his personal estate taking no benefit, the *onus* is thrown upon those who wish to make it liable to show some reason for doing so.

HOFF'S APPEAL.

SUPREME COURT OF PENNSYLVANIA. 1855.

[*Reported* 24 *Pa.* 200.]

WOODWARD, J.[1] The testator devised to his wife, the appellant, for life, the house in which he dwelt on Chestnut Street, together with the policy of insurance and furniture. When he purchased the house in 1847, there was a mortgage resting on it for $8,400, made by a former owner, and his will is silent in regard to the payment of the mortgage. The executors paid it off out of the personalty, and took an assignment; but the creditor and the Court of Common Peas refused to allow them a credit for it on the ground that the widow took the estate *cum onere*, and that she must pay the mortgage. She appeals, and the question is whether the mortgage is chargeable on her estate or on the personalty.

The will contains, in the introductory clause, the usual direction as to payment of debts, a phrase which in England is necessary to charge debts on the realty, but wholly unnecessary here, where lands as well as personal estate are bound for every decedent's debts. Still the words "after the payment of my lawful debts," cannot be treated as meaning nothing; and if they are to have any significance, it must be that the executors should pay the debts before distribution be made of the estate in pursuance of the will. A debt secured by a mortgage of the testator's own making, is no less a debt within the meaning of the introductory phraseology of wills than a promissory note; and executors are as much bound to pay the one as the other. The reason assigned in the English cases for throwing such a mortgage upon the personalty, is that the personal estate has been benefited by the making of the mortgage; a

[1] The opinion only is given.

reason for which we stand in no need, though it is as applicable here as there. As to the mortgagee, the mortgage is a specific lien, and he cannot be restrained from resorting to the land pledged; and as between him and other creditors, he will often be compelled to do so in relief of other funds; but as between the mortgagor and his representatives, his mortgage is evidence of indebtedness; and where there is nothing in the will to control their action, it is their plain duty to pay it. And to excuse them there must be a clear declaration of intention that the devisee of the mortgaged premises is to take them *cum onere*. Thus it is settled, says Powell, on the authority of a great number of cases (see his work on Devises, vol. 11, page 671), that a devise of mortgaged lands, subject to the mortgage thereon, does not throw the charge on the estate so as to exempt the funds which by law are antecedently liable, as the testator is considered to use the terms merely as descriptive of the encumbered situation of the property, and not for the purpose of subjecting his devisee to the burden.

But how is it where the estate comes to the devisor encumbered by a mortgage made by a former owner? If it come by descent or devise, and the testator has done no act to make the debt his own, his devisee will take the estate *cum onere*, and the executors are not chargeable with the mortgage; and the rule is the same even where the testator has purchased the estate, if he have had no connection, or contract, or communication with the mortgagee, and have done no act to show an intention to transfer the debt from the estate to himself. What dealings will have the effect to make the mortgage his own debt, have been debated in a great variety of cases, several of which counsel have cited in their paper-books. It seems that paying the mortgagee a higher rate of interest, and indemnifying the vendor against the mortgage, both which occurred in this case, are not such acts on the part of the purchaser as make him personally liable for the mortgage-debt. *Shafto* v. *Shafto*, 2 Cox's P. W. 664; *Woods* v. *Huntingford*, 3 Ves. 128.

The court below ruled the question on this ground. The learned judge said, it must appear that he (the testator) has done some act by which he has made himself directly liable to the owner of the encumbrance; and then he ruled that the evidence submitted to the auditor was insufficient to shift the obligation from the real to the personal fund. We agree that some act must be shown, indicative of an intention to take the mortgage upon himself, and the court were, perhaps, right in setting aside the evidence of payment of an increased rate of interest, and certainly right in disregarding the declarations of the testator, made to persons having no interest in the subject; but they overlooked one important and decisive fact, which was in full proof before the auditor, to wit, that Hoff purchased not merely the equity of redemption in this house and lot, but the entire interest, and that the mortgage formed part of the price of the estate. The proof was that he bought of William Reynolds and wife for $13,900; that he paid $5,500, which, with this mortgage of Elmes to Harvey of $8,400, was

"in full the consideration for the premises." The receipt of Reynolds, indorsed on his deed to Hoff, stipulates, moreover, that the said mortgage and the interest due, and to grow due, thereon are to be paid by the said John Hoff.

Now, it is immaterial whether this amounted to a *covenant* on the part of Hoff to pay the mortgage, though, according to the doctrine of *Campbell* v. *Shrum*, 3 Watts, 60, and the cases there cited, it might be easy to say it did, but surely there can be no doubt he would be liable to an action for money had and received, at the suit of the mortgagee. As was said in the case of the *Earl of Belvidere* v. *Rochfort*, cited in 2 Powell on Devises, 679, the plain intent of the deed was to put the purchaser in the place of the vendor, and that he might not be longer liable to the mortgagee, a sufficient part of the purchase-money was left in the purchaser's hands for satisfaction of the mortgage, the purchaser thereby taking upon himself the vendor's bond and covenant for payment of the mortgage, as fully as if he himself had covenanted to pay it off, and either the vendor or mortgagee might, upon that contract, have compelled him to pay it off. The decree in that case was confirmed by the House of Lords, and though some doubt has been thrown upon it by Lord Thurlow in *Tweddell* v. *Tweddell*, 2 B. C. C. 107, and by Lord Alvanley, in *Woods* v. *Huntingford;* still, its good sense is its sufficient vindication, and commends it to our acceptance. Nor is the doctrine of that case destitute of support from authorities of high respectability, as may be seen by consulting *Billinghurst* v. *Walker*, 2 B. C. C. 608; *Cope* v. *Cope*, 2 Salk. 449, 2 Ch. Ca. 5; *Pochley* v. *Pochley*, 1 Vern. 36; *King* v. *King*, 3 P. W. 360; *Galton* v. *Hancock*, 2 Atk. 436; *Robinson* v. *Gee*, 1 Vesey, 251; *Phillips* v. *Phillips*, 2 Bro. C. 273; *Johnson* v. *Milkrop*, 2 Vern. 112; *Balsh* v. *Hyam*, 3 P. W. 455.

If then Hoff, in his purchase of Reynolds, made himself liable to the mortgagee in any form of action, how can we hesitate to call the mortgage his debt? It is of no consequence that the mortgagee was not a party to the dealings between Hoff and Reynolds, for it is a rudimental principle, that a party may sue on a promise made on sufficient consideration for his use and benefit, though it be made to another and not to himself. It is equally unimportant that the mortgagee's remedies against the land remained unimpaired. The question before us does not touch the specific lien of the mortgage, but the personal liability of the purchaser. He made himself liable to his vendor and to the mortgagee, and he retained purchase-money enough in his hands to indemnify himself. That money belonged to the mortgagee, and I hold he might have recovered it in *assumpsit* if not in covenant; but, not being paid in the lifetime of Hoff, his personal estate had the benefit of it, and it went into the hands of his executors for the payment, first of all, of his "lawful debts." He had no debt more lawful than this mortgage, and there is great precision in the equitable principle which devotes that money in the executor's hands to the satisfaction of this debt.

But that principle is applicable only when there is no controlling testamentary intention expressed. If it were deducible from the whole will, that the testator meant his widow should pay the mortgage out of her life estate, we should be obliged to say so — for the will is the law of his estate. But no such intention is manifest.

It is clear, however, beyond all doubt, that he meant the bulk of his personal estate should go to legatees in the form of pecuniary legacies; and it seems to be settled, that the devisee of a mortgaged estate is not entitled to be exonerated out of personal estate specifically bequeathed: *Neal* v. *Mead*, 1 P. W. 693. And the same rule, it has been decided, extends to pecuniary legacies: *Lutkins* v. *Leigh*, Cases in Time of Talbot, 3; *Hamilton* v. *Morely*, 2 Vesey, Jr. 65. In *Ruston* v. *Ruston*, 2 D. 243, s. c. 2 Y. 54, we have a discussion of many of the principles I have adverted to; and, under a devise of mortgaged premises, it was held that the personal estate of the testator shall not go in ease of the mortgaged premises, so far as to defeat specific or ascertained pecuniary legacies, or any part thereof; — *aliter* of the legacies of the residuum.

On this ground the decree of the court can be sustained so far as the ascertained legacies under the will are concerned, but not as to the residuum, and the auditor's report shows that there will be a residuum, though not of sufficient amount to pay off the mortgage. Whatever there is must be applied to the mortgage in ease of the widow's life estate. The auditor distributed this under the 13th clause of the will; but so much of the decree as sustains this distribution must be reversed. If that clause be regarded as a bequest of additional legacies, it is so general and indefinite in terms as not to exempt the portion of the estate to which it applies from contribution to the mortgage.

Williams, for appellant.

Serrill, *Guillou*, and *Fallon*, for residuary legatees.

SECTION V.

MARSHALLING.

SAGITARY *v.* HYDE.

CHANCERY. 1687.

[*Reported* 1 *Vern.* 455.[1]]

IN the principal case there being a debt owing to the king, it was ordered that the king's debt should be satisfied out of the real estate, that the other creditors might be let in to have a satisfaction of their debts out of the personal assets.[2]

[1] Only that part of the case which relates to the question of marshalling is given.

[2] See *Aldrich* v. *Cooper*, 8 Ves. 382 (1803).

MASTERS *v.* MASTERS.

CHANCERY. 1718.

[*Reported* 1 *P. Wms.* 421.[1]]

MRS. MARY MASTERS by her will left several legacies to several of her relations and others; for instance, to her nieces A. B. and C. pecuniary legacies, (viz.) to A. and B. £200 apiece, and to her niece C. £400, and having a mother living, gave all her household goods, after her mother's death, to be divided among her said three nieces, and also the best of her clothes; she likewise by her will gave several specific legacies, and to the poor of two hospitals in Canterbury (naming them) £5 apiece; as to her lands she devised them to her nephew and heir-at-law, the defendant Sir Harcourt Masters, *but charged the same with the payment of her legacies above-mentioned*, and made the defendant Sir Harcourt executor.

Afterwards her mother died, by which a considerable increase of personal estate came to her, and thereupon she made a codicil, thereby giving several pecuniary legacies to several to whom she had before given legacies by her will, many of which legacies were larger than what were given them by her will.

Her codicil happened not to be attested by any witness, and so as was admitted, could charge no land.

It was also admitted, that both her real and personal estate were deficient in value to pay the legacies and annuities given by her will and codicil.

The defendant Sir Harcourt proved her will and codicil, and upon a bill brought for the payment of several of the legacies to several of the plaintiffs,

First, it was decreed by the MASTER OF THE ROLLS [SIR JOSEPH JEKYLL], that the personal estate not being sufficient to pay the legacies both by the will and codicil, and the real estate being liable to the legacies by the will, and not to those by the codicil, the estate should be so marshalled, that, as far as possible, the whole will might take effect, and all the legacies be paid.

And therefore, that the legatees in the will should be paid out of the real estate, and if that should be deficient, they must, as to the surplus, come in average with the legatees in the codicil, to be paid out of the personal estate; and, there being admitted to be a deficiency, that the land should be forthwith sold to prevent a greater deficiency, but that the specific legacies must be all paid, and not abate in proportion; on the contrary that the charities, though preferred by the civil law, yet they ought to abate in proportion, for they were but legacies.[2]

[1] Only that part of the case which relates to marshalling is given.

[2] See *Scales* v. *Collins*, 9 Hare, 656 (1852).

DEG *v.* DEG.

CHANCERY. 1727.

[*Reported* 2 *P. Wms.* 412.[1]]

On an appeal from a decree at the Rolls. A bill was brought by the creditors of Simon Deg the defendant's father (some of which were bond-creditors and some simple contract-creditors) for the payment of their debts out of a personal estate, and out of a trust-estate created by the will of Simon Deg for that purpose.

17 June 1715. Simon Deg makes his will attested by three witnesses, and therein by express words devises his lands in Staffordshire and all his lands in Derby and elsewhere in the county of Derby, and the equity of redemption thereof, and all his personal estate to trustees, (viz.) Lord Macclesfield and ——— Poole Esq.; and to their heirs, executors and administrators, in trust that they should sell all these devised premises, and thereby, together with his personal estate, pay all his debts, and the surplus to be applied as by will, leaving the trustees executors.

Soon after the testator Simon Deg dies, leaving three sons by his second wife, being indebted £8,000 and upwards by marriage articles (which is a debt by specialty) and £570 by simple contract, and £2,331 for rents and profits received by Simon Deg after his first wife's death, from an estate that upon the death of his said first wife did belong to the defendant Simon Deg his eldest son.

And upon this case the several following points arose, and were determined. . . .

Thirdly. The next point (and what was principally appealed from in his Honor's decree) was, that he had decreed, that though the specialty creditors were at liberty to take their preference out of the personal estate, yet in case these should come in upon the lands devised in trust to pay all the debts, they should first bring into hotchpot what they had received out of the personal estate.

Against which it was objected, that the specialty creditors, as to the personal estate of the testator, were to have the preference and to be first paid; and for the residue of their debts remaining unpaid, they ought to come in with the simple-contract creditors upon the trust-estate; that the testator had no power over the personal estate, so as to exempt the same from his debts, or from payment in a course of administration; and therefore, if the devise were of the personal estate to be equally divided betwixt his specialty creditors, and simple-contract creditors, this would be void, and the specialty creditors would have all; so that the devise of the personal estate being void, it was as if it were entirely omitted out of the will, or the devise was only of the real

[1] Only that part of the case which relates to marshalling is given.

estate for the payment of debts; and for the payment of debts must signify the payment of all debts, which would take in those by specialty as well as by simple contract; besides, in this case the fact happened to be, that if the specialty creditors were to bring into hotchpot what they received out of the personal estate, they then would receive little or nothing out of the real estate; and consequently the devise, as to them, for payment of their debts with the other creditors out of the real estate, would be vain.

However, this part of the decree was affirmed by the Lord Chancellor [King], in regard the testator had connected together his real and personal estate with a view that all should go equally to pay his debts, and he might give his equitable assets in what manner and upon what terms he pleased: for instance, he might dispose of them in trust to pay his simple-contract debts only, though it was true he had no power by his will to dispose of his personal estate from his creditors, or to devise it for satisfaction of his simple-contract creditors, in preference to his specialty creditors; but these equitable assets being entirely within his power, he might let in the specialty creditors for a satisfaction thereout, under what terms he should think proper; and it was a very ill argument to say, that the specialty creditors had received so much out of the personal estate, as to make it not worth their while to bring it into hotchpot; for the more they had received of the personal estate, the less need they had of the aid of a court of equity to be paid out of the trust estate.

MOGG *v.* HODGES.

Chancery. 1750.

[*Reported* 2 *Ves. Sr.* 52.[1]]

Jane Churchill by will leaves her real estate to trustees to be sold; the profits to be applied to the uses of the will: directs, that her debts and legacies should be paid out of the personal estate; makes the trustees executors; and leaves them all the residue of her personal estate and of that money, that should be raised by sale of her real, to be given by them in what charities they should think proper, particularly recommending to them the hospital at Bath.

The trustees agreed, that as all money arising from a real estate is to be accounted as real, the bequest was so far void by Statute of Mortmain, 9 G. 2, *c.* 36, but desired, that in compliance with the intent of testatrix the assets should be so marshalled, that all the other legacies should be paid out of the real estate, and so the personal go to the charity, which legacy might, according to *Dalton* v. *James*, Ambl. 20: and the common course of the court, where there are bond and

[1] Only that part of the case which relates to marshalling is given.

other creditors, is to direct the bond-creditors to be paid out of the real estate, that the personal might be left to others.

Lord Chancellor [Hardwicke] thought himself not warranted to set up a rule of equity, contrary to the common rules of the court, merely to support a bequest which was contrary to law. It would be contrary to the express direction of the testatrix, who desires first, that her legacies and debts should be paid out of the personal; that is, the natural fund; and if the heir or devisee of the real estate is sued by a bond-creditor, he may stand in the place of that creditor to be reimbursed out of the personal. In *Dalton* v. *James*, the legacies were particularly chargeable on both estates; and the court will always for the furtherance of justice, as in the case of debts, or, to comply as far as is consistent with law with the intention of testator, in the case of legacies, when there are two different funds for payment of debts and legacies, order each particular to be paid out of that fund it legally may. But the assets cannot be so marshalled to support a legacy contrary to law.

NOTE

ON THE RIGHT OF THE EXECUTOR TO WAIVE THE DEFENCE OF THE STATUTE OF LIMITATIONS.

In England. If an executor pays a debt justly due from his testator, but barred by the Statute of Limitations, he is not guilty of a *devastavit*, *Lowis* v. *Rumney*, L. R. 4 Eq. 451 (1867); and in a suit subsequently brought for the administration of the estate such payment will be allowed him, *Hunter* v. *Baxter*, 3 Giff. 214 (1861), even against the devisees of the real estate upon whom other debts are in consequence thrown, *Lowis* v. *Rumney*.

But an acknowledgment by an executor will not keep a debt alive so that it can be proved directly against an heir or devisee, *Putnam* v. *Bates*, 3 Russ. 188 (1826). See also *Briggs* v. *Wilson*, 5 De G. M. & G. 12 (1854). And in *Fordham* v. *Wallis*, 10 Hare, 217 (1852), it was *held* that a simple contract debt which had been kept alive against the personalty by the conduct of the executors, was not entitled under the doctrine of marshalling to stand in the place of specialties against the real estate; but this seems opposed to *Lowis* v. *Rumney;* and see Darby & Bos. Sts. of Lim. 87–90.

An executor may retain a debt due to himself from the testator though barred by the Statute, *Hill* v. *Walker*, 4 K. & J. (1858); and this right is not lost by failure to assert it before a decree in an administration suit, *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415 (1853).

But after decree in an administration suit, the executor, except as to his own debt, loses his right to waive the defence of the Statute, *Phillips* v. *Beal* (No. 2), 32 Beav. 26 (1862); and the defence of the Statute may be insisted upon, either by the residuary legatee, *Shewen* v. *Vanderhorst*, 1 Russ. & Myl. 347 (1831); *Moodie* v. *Bannister*, 4 Drew. 432 (1859); or by another creditor, *Fuller* v. *Redman* (No. 2), 26 Beav. 614 (1859). But if the administration suit has been brought by a creditor, the plaintiff's debt is not open after decree to an objection that it is barred under the Statute, made either on behalf of the residuary legatee, *Briggs* v. *Wilson*, *ubi sup.*, or of a creditor, *Fuller* v. *Redman* (No. 2).

But in an administration suit, if neither the executor nor any one beneficially interested in the estate interpose the bar of the Statute to any claim, the court will not interfere *mero motu*, *Alston* v. *Trollope*, L. R. 2 Eq. 205 (1866). And in *Combs* v. *Combs*, L. R. 1 P. & D. 288 (1866), administration was granted to a creditor whose debt was barred by the Statute.

In America. The matter is very much affected by the Statutes for settling estates. In some States, the executor can waive the bar of the Statute of Limitations, *Walter* v. *Radcliffe*, 2 Desaus. 577 (1808); in others not, *Peck* v. *Botsford*, 7 Conn. 172 (1828). In some States it is *held* that he cannot waive the defence if the claim is barred at the time of his appointment, but can, if it has not become barred till afterward, *Seig* v. *Acord*, 21 Grat. 365 (1871); *Byrd* v. *Wells*, 40 Miss. 711 (1866). See *Smith* v. *Pattie*, 81 Va. 654 (1886).

And it has been sometimes *held*, contrary to the English cases *supra*, that an executor cannot retain for a debt from the testator to himself which is barred by the Statute. *Rogers* v. *Rogers*, 3 Wend. 503 (1829); *Hoch's Appeal*, 21 Pa. 280 (1853).

As in England, it has been *held* in North Carolina, that on a creditor's bill for the administration of an estate, any creditor can interpose the objection of the Statute to the claim of any other creditor. *Wordsworth* v. *Davis*, 75 N. C. 159 (1876).

So, in Pennsylvania, on proceedings in the Orphans' Court, *Kittera's Estate*, 17 Pa. 416 (1851). But cf. *Ritter's Appeal*, 23 Pa. 95 (1854).

And the law seems to be the same on the settlement of estates in New York, *Matter of Kendrick*, 107 N. Y. 104 (1887) ; and cf. *Partridge* v. *Mitchell*, 3 Edw. Ch. 180 (1838).

On an application however to sell land for the payment of debts, the heir or devisee is not bound by an executor's waiver of the defence of the Statute, and this not only in New York and North Carolina, *Mooers* v. *White*, 6 Johns. Ch. 360 (1822) ; *Bevers* v. *Park*, 88 N. C. 456 (1883), but also in States, *e. g.* Alabama, where it would seem that the executor has entire control of the defence of the Statute as to the personal assets, *Steele* v. *Steele*, 64 Ala. 438 (1879).

But in some States the heir is bound by the executor's waiver, *Hodgdon* v. *White*, 11 N. H. 208 (1840) ; *Trimble* v. *Marshall*, 66 Iowa, 233. And even in North Carolina, if a judgment has been obtained in a suit against an administrator, the heir is bound by it, in the absence of fraud, though the administrator might have pleaded the Statute in the suit, but did not, *Speer* v. *James*, 94 N. C. 417 (1886).

See 2 Woerner, Amer. Law of Adm. § 401.

In most of the States, there are Statutes requiring claims to be presented against the estates of deceased persons within a certain time, and generally executors have no power to waive these special Statutes of Limitation. 2 Woerner, § 400.

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